Supreme Court, U.S.
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No. 00-288

IN THE
SUPREME COURT OF THE UNITED STATES

JAY C. SMITH,

Petitioner,

v.

JOHN J. HOLTZ; RONALD F. COLYER; VICTOR DOVE; JOHN J. PURCELL; WILLIAM LANDER, AND PAUL YATRON

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Are the Constitutional rights of an accused violated when, during a capital murder trial, the prosecution intentionally suppresses exculpatory evidence which is required to be disclosed under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)?

(2) Is the intentional suppression of "*Brady* evidence," properly defined, always a violation of Constitutional dimension?

(3) What is the proper test for determining whether exculpatory evidence is "material," as the term is defined by *Brady* and its progeny?

PARTIES TO THE PROCEEDINGS

PETITIONER

Jay C. Smith is an individual citizen of the Commonwealth of Pennsylvania. He is not related to any corporate entity.

RESPONDENTS

John J. Holtz; Ronald F. Colyer; Victor Dove; John J. Purcell; William Lander; and Paul Yatron. Respondents are individuals, unrelated to any corporate entity. Although they were defendants in the original proceeding, Respondents Colyer, Purcell and Lander were voluntarily dismissed as defendants, and plaintiff asserts no claim against them.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 210 F.3d 186 (3d Cir. 2000). A copy of the Opinion is included in the Appendix at Appendix A, 1a-32a. The opinion of the District Court for the Middle District of Pennsylvania is reported at 30 F.Supp. 2d 468 (M.D. Pa. 1998). It is included in the Appendix at Appendix C, 35a-66a. The District Court ordered entry of the final judgment on December 14, 1998. A copy of the order appears in the Appendix at Appendix D, 67a.

JURISDICTION

The United States Court of Appeals for the Third Circuit issued its opinion on April 13, 2000. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on April 27, 2000. The Court of Appeals denied the Petition on May 22, 2000 (App. E, at 68a).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(i) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment V

No person shall be . . .deprived of life, liberty, or property, without due process of law. . .

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[1] Citations to "App." are to the appendix filed with this Petition pursuant to Supreme Court Rule 14(i).

U.S. Const., Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

U.S. Const., XIV §1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law. . .

Civil action for deprivation of rights.
42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

STATEMENT OF THE CASE

This appeal arises from Petitioner's civil claim for damages under 42 U.S.C. §1983. The federal nature of that claim provides the basis for federal jurisdiction in the first instance, under 28 U.S.C. §1331.

Petitioner's federal claim originated in a now infamous murder prosecution.[2]

In 1986, after a highly publicized trial, Petitioner, who had been principal of a suburban Philadelphia-area high school, was convicted of murdering Susan Reinert, a teacher at the school, and her two children. He was sentenced to death, and consigned to "death row."

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[2] The trial, appeal, and ultimate release of Jay C. Smith have been variously treated in film and several books. See, e.g., Costopoulos, W., *Principal Suspect*, Philadelphia: Camino Books (1996); Schwartz-Nobel, L., *Engaged to Murder*, New York: Viking (1987); Wambaugh, J., *Echoes in the Darkness*, New York: Wm. Morrow (1987). The seminal decision of the Pennsylvania Supreme Court ordering Smith's discharge, *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992) (App. K, 115a-126a) is frequently cited in the legal literature. See, e.g., Bierschbach, R., *One Bite at the Apple: Reversals of Convictions Tainted by Prosecutorial Misconduct and the Ban on Double Jeopardy*, 94 Mich. L. Rev. 1346, 1374 (1996); Radelet, M., *et al.*, *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. Cooley L. Rev. 907, 962 (1996); and Rosenthal, K., *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 Temple L. Rev. 887, 961 (1998).

In 1989, Petitioner was granted a new trial by the Pennsylvania Supreme Court, which found that the admission against him of multiple hearsay statements constituted reversible error. *Commonwealth v. Smith*, 523 Pa. 577, 568 A.2d 600 (1989) [hereinafter referenced as "*Smith I*"]. Still imprisoned awaiting a new trial, Petitioner moved for his discharge, based on his discovery, "long after his trial," that material exculpatory evidence had been withheld from him. *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321, 323 (1992) (App. K at 119a) [hereinafter referenced as "*Smith II*"].

The intentionally suppressed evidence included exculpatory physical evidence in the form of "lifters" which a former Pennsylvania State Policeman, John Balshy, testified he had used to remove and retain particles of sand from the body of Susan Reinert. *Smith II*, 615 A.2d at 323 (App. K at 118a).[3]

Although Balshy verbally disclosed his finding on cross-examination by Petitioner's defense counsel, he no

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[3] The prosecution's suppression of evidence was not confined to the lifters. In addition, it hid a "deal" for favorable treatment with its chief witness, a "jailhouse informant" who testified that Smith had confessed. *Smith II*, 615 A.2d at 322 (App. K at 118a). It was also later discovered that the lead investigator for the prosecution, Respondent Holtz, had received $5,000.00 (during the trial) with a promise of $45,000.00 more from crime writer Joseph Wambaugh, providing ample motive for Holtz to prevent plaintiff's acquittal, which would presumably diminish Holtz's heroic role as portrayed by Wambaugh. At Petitioner's civil trial, Holtz did not dispute his financial arrangement with Wambaugh. App. H at 96a. See also, *Smith v. Holtz*, 30 F.Supp. 2d 468, 472 (M.D. Pa. 1998) App. C at 41a-42a.

longer had possession of the lifters, the physical evidence which would corroborate his recollection. Seizing on this fact, the prosecution excoriated Balshy, called several other policemen to rebut his testimony, and denounced him to the jury as a perjurer "in search for the dollar." These trial tactics, all admitted during Petitioner's 1998 civil trial, were reflected in the prosecutor's closing argument at the 1986 trial. App. I, at 107-109a. See also, *Smith II*, 615 A.2d at 322-3 (App. K at 118a-121a).

The lifters were vital to Petitioner's defense, because they provided physical evidence consistent with his contention that Susan Reinert was killed at the New Jersey shore by William Bradfield[4] and/or his confederates, who were known to be in Cape May, on the New Jersey shore, during the weekend of Reinert's disappearance and death. *Smith II*, 615 A.2d at 323 (App. K at 119a). This importance was verified by the prosecutor himself, who wrote in a mid-trial memorandum that "[Smith] will attempt to establish that Mrs. Reinert was killed at the shore in Cape May, New Jersey [by Bradfield and friends]; the sand therefore is extremely material to the defense case." *Id.* The prosecutor's actual memorandum, admitted into evidence at the civil trial below, is included in the Appendix at App. J, at 111a-114a. See also, the testimony of plaintiff's defense counsel regarding the importance of the lifters in the actual context of the 1986 murder trial. App. F at 72a-75a.

The Pennsylvania Supreme Court ordered evidentiary hearings to be held regarding the lifters. *Smith I*, 568 A.2d

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[4] Bradfield, who had been separately convicted of the same murders in 1983, was Susan Reinert's "fiancé," and the beneficiary of her life insurance policy for more than $700,000.00.

at 610, n. 8. Those hearings before the Pennsylvania courts resulted in the conclusion that the lifters were authentic, and there was "no evidence of perjury or falsification by Balshy." *Smith II*, 615 A.2d at 324 (App. K at 121a).

The Pennsylvania courts also found that, *while Petitioner's murder trial was in progress,* the lifters had come into the possession of Respondent Victor Dove, a policeman on the prosecution team, and that Dove never disclosed the existence of the lifters, *even to the prosecutor*, until one week later, the day after Petitioner had been convicted. Dove's testimony admitting these facts at the civil trial below is included in the Appendix at App. G, at 76a-92a. Dove stated that he had kept the lifters a secret, in part because he did not want his fellow policemen, who had testified contrary to Balshy, to "look like perjurers." App. G at 84a-87a. One of those policemen was Respondent Holtz, the prosecutor's lead investigator, and a key witness. *Id.*

On a date disputed by the parties[5], Dove surrendered the lifters to Respondent Holtz. After the trial was over, Holtz informed the prosecutor, Richard Guida, of the lifters' existence. Guida had been the prosecutor at trial, but was not involved in the appellate procedures. The lifters passed into the control of Respondent Paul Yatron, an attorney within the Attorney General's office, who was assigned the investigation of perjury charges against Balshy, the witness who had testified that they existed. Yatron failed to disclose their

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[5] Holtz and Dove testified at trial that Dove gave Holtz the lifters on May 1, 1986, the day after the conclusion of the trial. App. G at 85a-87a. Plaintiff introduced evidence that Dove let Holtz know about the existence of the lifters immediately upon finding them. App. G at 89a-92a.

existence to Robert Graci, the new prosecutor representing the Commonwealth in Petitioner's appeals.

It was not until July, 1988 — more than two years after plaintiff's conviction — that Petitioner's defense counsel was informed of the existence of the lifters. *Smith II*, 615 A.2d at 324 (App. K at 121a).

Referring to the lifters, the Pennsylvania Supreme Court readily held that their suppression was "clearly in violation of the rule of *Brady v. Maryland*, 373 U.S. 83 (1963)." *Smith II*, 615 A.2d at 322 (App. K at 117a). But in a landmark holding, the Court went on to bar the retrial of plaintiff, citing the extreme nature of the "prosecutorial misconduct" which had victimized Smith:

> Deliberate failure to disclose material exculpatory physical evidence during a capital trial, intentional suppression of the evidence while arguing in favor of the death sentence on direct appeal, and the investigation of Corporal Balshy's role in the production of the evidence rather than its own role in the suppression of evidence constitute prosecutorial misconduct such as violates all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause.

Id. at 323 (App. K at 121a).

After his discharge, Smith filed his civil action, alleging that his conviction and subsequent confinement were Constitutionally wrongful, and seeking monetary damages. Seven days before the beginning of trial, the parties stipulated that the *Brady* nature of the lifters was an issue for the court,

not the jury. Smith objected to the submission of the "*Brady* question" to the jury, both on the grounds that it was an issue for the court to decide and because, in any event, he was entitled to a directed verdict to the effect that the lifters were material and exculpatory evidence. At the close of the evidence, based on Dove's admissions, Smith also moved the court to direct an affirmative answer to Jury Interrogatory no. 3, which asked whether Dove had "intentionally refrained from disclosing the existence of the lifters to the prosecutor before May 1, 1986." The District Court denied both requests. After several days of deliberation, the jury returned a verdict in favor of defendants.

In denying plaintiff's post-trial motions, the district court largely confined its analysis to its holding that the jury properly found that the suppressed evidence was not "material and exculpatory." Accordingly, it did not address whether any view of the evidence could support the jury's findings that Dove (and another defendant, Yatron) had not intentionally refrained from disclosing the existence of the lifters to the relevant prosecutor. App. C at 60a-62a. Similarly, it found that Petitioner's other assignments of error had been "obviated" by its conclusion about the lifters, and failed to analyze whether the jury's findings regarding individual defendants were irretrievably tainted or confused by the court's legal rulings. *Id.*

On appeal, a panel of the Third Circuit Court of Appeals opined that the District Court had erred when it held that disclosure of the lifters was not required under *Brady v. Maryland*, supra. *Smith v. Holtz*, 210 F. 3d at 196 (App. A at 22a). The panel wrote:

> We agree that the lifters were *Brady* material, and we therefore disagree with the District

> Court's ruling to the contrary . . . However, we nevertheless conclude that the District Court's ultimate holding that Smith failed to establish a *Brady* violation was correct.

Id. at 197 (App. A at 22a).

Based on this analysis, the Panel denied the appeal, and never reached Petitioner's other questions. Petitioner's request for *en banc* review was subsequently denied.

ARGUMENT FOR GRANTING WRIT

For the reasons which follow, Petitioner submits that the Court should grant his Petition for Writ of Certiorari. The decision of the Third Circuit Court of Appeals involves Constitutional issues of exceptional importance. It is premised on a misconstruction of this Court's jurisprudence in *Brady* and its progeny, including its recent articulation in *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936 (1999). It ignores the importance of determining the "materiality" of exculpatory evidence in light of the specific context of the specific trial to which it is relevant, contrary to this Court's directives. See, e.g., *Kyles v. Whitley*, 514 U.S. 419 (1995). Accordingly, it pays mere lip service to the established principle that suppression of exculpatory evidence rises to the level of a *Brady* [Constitutional] violation, where the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, supra, 119 S.Ct. at 1952, citing *Kyles*, 514 U.S. at 435.

These are not simple academic matters. As it stands, the decision below confounds understanding of the *Brady*

rule, represents a step toward vitiation of that rule and its important Constitutional function, and invites prosecutorial misconduct in future cases.

ARGUMENT 1

The Third Circuit Court's opinion makes a false distinction between suppression of "*Brady* evidence," properly defined, and a "*Brady* violation."

The opinion below clearly and correctly pronounces that the lifters in this case comprise evidence which was required to be disclosed under *Brady*.

The Court based this holding, *inter alia*, on the recognition by the prosecutor himself, recorded in a mid-trial memorandum, that the lifters and the sand they contained were "extremely material" to the defense case, 210 F.3d at 196 (App. A at 22a), and on the conclusion of the Pennsylvania Supreme Court that suppression of the lifters constituted "deliberate failure to disclose *material exculpatory physical evidence* during a capital trial." *Id.*, citing *Smith II*, 615 A.2d at 324. (emphasis supplied).

The Court's acknowledgment of the *Brady* nature of the suppressed evidence renders incongruous its holding that the intentional suppression of the evidence did not comprise a "*Brady* violation."

The Court below can only rationalize its self-contradictory holding through misapprehension of the clear doctrine of *Brady* and its progeny that *Brady* evidence, properly defined, is *a fortiori* "material," and that the

suppression of such evidence is a Constitutional violation. See, e.g., *U.S. v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *U.S. v. Agurs*, 427 U.S. 97 (1976). Thus, if, as the Third Circuit panel correctly recognized, the lifters were truly *Brady* evidence — material exculpatory physical evidence required to be disclosed under *Brady* — they cannot be "immaterial" for purposes of determining a Constitutional violation.

The Court below sows further confusion by misinterpreting *Strickler v. Greene*, supra. Contrary to the Third Circuit panel's interpretation, *Strickler* neither changed the *Brady* rule, nor posited a "distinction" between suppression of "*Brady* material and a *Brady* violation..." Compare, Panel's opinion, 210 F.3d at 196 (App. A at 21a), and *Strickler*, 119 S.Ct. at 1951, n. 35. Rather, this Court in *Strickler*, consistent with its precedent, simply held that not every suppression of exculpatory evidence violates *Brady*, because not all exculpatory evidence is *material*. *Id.* at 1936. But if evidence is not "material," it is not *Brady* evidence. The decision below wrongly dichotomizes the inquiry regarding "materiality" of evidence and "the question [under *Brady*] of whether the prosecution must disclose [the] evidence." 210 F.3d at 196, App. A at 20a. As argued below, this false dichotomy results in a misapplication of this Court's standards for determining the "materiality" of exculpatory evidence. Allowing it to stand will also plainly lead to confusion and Constitutional mischief. In future cases, prosecutors may cite the Third Circuit's decision to argue that, although evidence which is required to be disclosed under *Brady* is suppressed, no Constitutional violation occurs. Such a likelihood needlessly complicates the appropriate *Brady* analysis, and increases the probability of Constitutional violations.

ARGUMENT 2

The decision of the Court below misapplies the proper standard for determining "materiality" of exculpatory evidence, as enunciated by the Supreme Court in *Brady* and its progeny, including *Strickler*.

Suppression of exculpatory evidence rises to the level of a *Brady* violation, where the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 119 S.Ct. at 1952, citing *Kyles v. Whitley*, 514 U.S. at 435. This is the meaning of "materiality" in *Brady's* Constitutional doctrine.

Although the Third Circuit panel recognized the "undermined-confidence-in-the-verdict" standard, it gave it no real credence in its actual analysis. In particular, the Panel ignored a vital *caveat* emphasized in *Brady* jurisprudence: "[T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusion." *Strickler,* 119 S.Ct. at 1952.

Moreover, the "reasonable probability" of a different outcome required under the "materiality" element of a *Brady* violation "does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, *let alone that without the materials withheld the evidence would have been insufficient to support the result reached. Strickler*, 119 S.Ct. at 1955 (Souter, J., concurring and dissenting) (emphasis supplied).

But the Third Circuit Panel here stood the *Strickler* analysis on its head, focusing entirely on the so-called "inculpatory" evidence admitted against Petitioner at his murder *trial*, without serious reference to the importance of the suppressed exculpatory evidence in the specific context of that trial, especially given the far-reaching and effective use made by the prosecution of the purported absence of the physical evidence it was all the while suppressing.

Here, the Panel not only failed to assign any weight to the importance of physical evidence supporting the testimony of a former state policeman who described a finding supporting the defendant's theory of the case; it also ignored the devastating effect on that testimony engendered solely by the prosecution's suppression of the very evidence which proved the testimony truthful, and which would destroy the credibility of the prosecution's other witnesses.

Worse, although the Panel gave token deference to the facts, it failed to consider the effect of the suppression of the evidence in the context of the underlying prosecution case, which : (a) was built almost entirely on circumstantial evidence; (b) was devoid of any proof of motive;[6] (c) rested on evidence subsequently held to be inadmissible hearsay; and (d) the only direct evidence was the testimony of a "jailhouse

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[6] The prosecution asserted that Smith killed Reinert because Bradfield had provided false alibi testimony for Smith in an unrelated trial on theft charges, and that Smith wished to prevent Reinert from disclosing Bradfield's perjury. But this theory made no sense. As the Third Circuit panel pointed out, Smith had already been convicted of the theft charges before Reinert was killed. Accordingly, "it is not clear why Smith would be that concerned with Bradfield's perjury being disclosed." 210 F.3d at 190, n. 3. App. at A at 6a-7a.

informant," whose favorable deal with the prosecution was also deliberately suppressed, in further violation of *Brady*.[7]

If, in such a context, the deliberate suppression of what the Supreme Court of Pennsylvania — the court which had before it all of the evidence — called "material exculpatory physical evidence" does not violate *Brady*, then *Brady* has been rendered a nullity.[8] Such a result cannot be permitted.

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[7] For an acknowledgment that this tainted testimony was the only direct evidence of Petitioner's "guilt," see the closing argument of the prosecutor. App. I at 104a.

[8] The Third Circuit panel incorrectly suggests that the decision of the Pennsylvania Supreme Court did not encompass a finding that the suppression of the lifters violated *Brady*. See, 210 F.3d at 199, App. A at 28a. To the contrary, referring specifically to the suppression of the lifters, the Pennsylvania Court explicitly stated that the prosecutor's tactics were "clearly in violation of the rule of *Brady v. Maryland*." *Smith II*, 615 A.2d at 322, App. K at 117a. Such a conclusion necessarily follows the Court's description of the lifters as "material exculpatory physical evidence." *Id.* at 324, App. K at 121a.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges the Court to grant his Petition for Writ of Certiorari.

/s/_____
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Dated: August 18, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Filed April 13, 2000]

No. 99-7046

JAY C. SMITH,
Appellant

v.

JOHN J. HOLTZ, Bureau of Technical Services, Pennsylvania State Police; RONALD F. COYLER, Bureau of Technical Services, Pennsylvania State Police; VICTOR DOVE; JOHN J. PURCELL, Special Agent in Charge, Central Regional Office, Bureau of Criminal Investigations, Office of the Attorney General; WILLIAM J. LANDER, Bureau of Criminal Investigations, Office of the Attorney General; PAUL YATRON

Appeal from the United States District Court
for the Middle District of Pennsylvania
Civil No. 93-cv-01428

District Judge: Hon. James F. McClure, Jr.

Before: SLOVITER, NYGAARD and MCKEE, Circuit Judges.

OPINION

McKEE, Circuit Judge.

Jay C. Smith, the former principal of Upper Merion High School in Upper Merion, Pennsylvania, appeals from a jury verdict in favor of defendants in the civil rights suit he filed under 42 U.S.C. §. 1983. The suit arose from an infamous murder and prosecution that were the subjects of books by noted author, Joseph Wambaugh, as well as Smith's criminal defense attorney. The prosecution also generated a host of criminal and civil litigation. See Smith v. Holtz, 30 F. Supp. 2d 468, 471 (E. D. Pa. 1998(collecting cases).

In 1986, Smith received three death sentences following conviction for the murder of Susan Reinert and her two children. Reinert had been an English teacher at Upper Merion High School while Smith had been the principal. The Pennsylvania Supreme Court subsequently vacated Smith's murder convictions, and remanded for a new trial because prejudicial hearsay had been improperly admitted during his trial. However, before Smith could be retried, he learned that the prosecution had not disclosed certain evidence that Smith claimed was exculpatory. The trial court found prosecutorial misconduct, but refused to bar retrial. However, on appeal of that decision, the Pennsylvania Supreme Court held that the double jeopardy clause of the Pennsylvania Constitution prohibited retrial, and ordered Smith's release.

Thereafter, Smith filed the instant civil rights action. He alleged that the defendants' deliberate suppression of exculpatory evidence violated the holding of Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and that he was therefore entitled to compensation for the resulting denial of his constitutional right to due process of law. The jury returned a verdict in favor of all of the defendants, and the District Court denied Smith's post-trial motions. Smith v. Holtz, 30 F. Supp 2d 468 (E. D. Pa. 1998). This appeal followed. We will affirm.

I. BACKGROUND[1]

The events leading to Smith's criminal prosecution began to unfold on Monday, June 25, 1979, at about 5:20 a.m., when a police officer found Susan Reinert's nude body in the hatchback trunk of her car. "The body showed evidence that Ms. Reinert had been chained and beaten, and her nude body was left lying in the fetal position in the back of her car. . . ." Id. at 471. At the time of her death, Reinert taught English at Upper Merion High School.

A forensic pathologist examined Reinert's body and "determined that Ms. Reinert had sustained massive hemorrhaging in the eye area and abrasions over her body. He also opined that certain prominent bruises on the back of the body. . . were consistent with the imprint of a chain. The

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[1] Our recitation of the facts is taken from the reported opinions of the Pennsylvania Supreme Court, the Pennsylvania Superior Court and the United States District Court for the Middle District of Pennsylvania.

cause of death was determined to be asphyxiation from an overdose of morphine, which was consistent with having been caused by criminal agency." Commonwealth v. Smith, 523 Pa. 577, 583, 568 A.2d 600, 603 (Pa. 1989). The pathologist opined that Reinert's death probably occurred during the morning hours of Sunday, June 24, 1979. Id.

Mary Grove, Reinert's next door neighbor, and Ms. Grove's granddaughter, Beth Ann Brook, saw Reinert and her two young children, Michael (age 10), and Karen (age 11) on Friday, June 22, 1979, at about 9:20 p. m., on Reinert's front porch. Shortly thereafter, Ms. Grove and Beth Ann heard Reinert and her children drive away in Reinert's car. Beth Ann noticed that Karen was wearing a small green pin with a white "P". This was the last known time that anyone saw Michael or Karen Reinert. Id. at 584.

Following the discovery of Susan Reinert's body, the local and state police conducted an extensive search in an effort to locate Michael and Karen. Karen and Michael had close relationships with their father -- who was divorced from their mother -- and their paternal grandmother. Both children knew where their father and paternal grandmother lived, and both children knew how to reach them by telephone. Id. at 587. However, neither the father nor the paternal grandmother ever heard from the children after June 22, 1979.

In addition to the search by local and state police, the Federal Bureau of Investigation opened a "missing persons case" and assigned eighteen agents full-time to a nationwide search that lasted five months. However, neither the FBI nor

the state or local police ever found a trace of either of the two missing children. Id. at 587.

Soon after Reinert's body was discovered, suspicion focused on William Bradfield (who was also an English teacher at Upper Merion High School), and on Smith. Police were eventually able to build a case against Bradfield, and he was charged with the murders of Reinert and her two children. In 1983, a jury convicted him of those murders, and he was thereafter sentenced to three consecutive life sentences. See Commonwealth v. Bradfield, 352 Pa. Super. 466, 508 A.2d 568 (Pa. Super. 1986). Bradfield died in prison in 1998 without ever disclosing the location of the bodies of the Reinert children.

In 1986, three years after Bradfield's trial, Smith was arrested and also charged with the Reinert murders based upon evidence that he had conspired with Bradfield.[2] During the ensuing trial, the Commonwealth introduced evidence that Bradfield had been involved in a romantic relationship with Reinert from 1973 until the time of her death. Reinert had made Bradfield the primary beneficiary under her will, the sole beneficiary of her $ 730,000 in life insurance, and the guardian of her children in the event of her death. She did all this because she believed Bradfield's promise that he would marry her. However, unbeknownst to Reinert, Bradfield had a lover named Susan Myers. Bradfield told his friends and

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[2] At the time of his arrest, Smith was in prison for convictions for theft by deception, receiving stolen property, possession of a firearm without a license and possession of marijuana. Attorney General's Br. at 8.

Myers that he was not interested in Reinert even though Reinert was enamored with him. Commonwealth v. Smith, 568 A.2d at 604.

As noted above, Smith was the principal of the high school where both Reinert and Bradfield taught. Smith's relationship with Reinert appeared to be strictly professional, but his relationship with Bradfield was quite nefarious. The Commonwealth's theory during Smith's prosecution was that Smith and Bradfield conspired to kill Reinert so they could share in her life insurance proceeds, and the testamentary assets that would go to Bradfield upon Reinert's death. The Commonwealth believed that Bradfield and Smith abducted Reinert and her two children pursuant to that conspiracy, and that Smith then killed them somewhere in Pennsylvania. Smith v. Holtz, 30 F. Supp. 2d at 473.

According to the Commonwealth, the illicit relationship between Smith and Bradfield began shortly after Smith's arrest on charges of theft. Smith had been charged with theft from a Sears in St. David's Mall in Montgomery County, Pennsylvania, in August of 1977, and Bradfield had been Smith's alibi witness at Smith's theft trial. Commonwealth v. Smith, 568 A.2d at 604. The Commonwealth theorized that Bradfield's alibi testimony had been perjured, and that Smith's motives for killing Reinert included preventing her from disclosing that his defense had consisted of perjured testimony.[3]

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[3] It is not clear why Smith would be that concerned with Bradfield's perjury being disclosed. Inasmuch as the jury convicted Smith despite Bradfield's alibi testimony, the jury clearly rejected

During Smith's murder trial, the Commonwealth contended that Smith and Bradfield formed their conspiracy to kill Reinhert and her children sometime after the theft trial. Although Bradfield's testimony had established Smith's alibi, the Commonwealth introduced testimony during Smith's murder trial that established that, contrary to Bradfield's alibi testimony, Smith had actually been inside the Sears store when the theft occurred. Id. That evidence was introduced at Smith's murder trial to demonstrate the nature of the relationship between Bradfield and Smith.

The Commonwealth also introduced physical evidence that linked Smith to the Reinert murders. A green pin with a white "P", similar to the one that Beth Ann Brook saw Karen Reinert wearing on June 22, 1979, was recovered from under the front seat of Smith's car. A hair similar to Susan Reinert's was found inside Smith's home, and testimony was offered to establish that fibers found on Reinert's body were similar to fibers from a carpet in the basement of Smith's home. In addition, Smith's former military reserve unit was named 79 USARCOM, and a comb imprinted with "79 USARCOM" was found in Reinert's car under her body. The prosecution also introduced a bag of identical combs that had been recovered from Smith's home. Finally, the prosecution introduced a letter that Smith had written to his wife while he had been incarcerated on the theft charges. In that letter, Smith asked her to dispose of the carpet in their home (the one with fibers similar to fibers found on Reinert's body), and clean the interior of his car (where Karen Reinert's pin was later found). Id.

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that testimony, and Smith's alibi defense.

The Commonwealth also presented the testimony of two inmates who had been incarcerated with Smith. One inmate testified that Smith asked him to kill state police detectives investigating the Reinert murders. The other testified that Smith had confessed his complicity in the Reinert murders to him, and that Smith had admitted to killing Reinert both for money and because he was afraid she would reveal that Bradfield had offered perjured alibi testimony. Id. at 605.

Bradfield was not called as a witness during Smith's murder trial. Nonetheless, the Commonwealth was allowed to present the testimony of several people who were either Bradfield's close friends or lovers. The first of these witnesses was Vincent Valaitis, another English teacher at Upper Merion High School. Valaitis testified that Bradfield told him in the fall of 1978 that he (Bradfield) had volunteered to serve as an alibi witness at Smith's theft trial. Valaitis also testified about several conversations he had with Bradfield in which Bradfield made statements incriminating Smith and suggesting that Smith was a Mafia hitman. Id. at 606. Valaitis said that Bradfield had urged him to join Bradfield, Susan Myers, and another teacher, Chris Pappas, on a trip to the seashore resort of Cape May, New Jersey, on the weekend that Reinert was killed. Valaitis claimed that Bradfield told the group that Smith was going to kill Reinert during that weekend and that their presence with Bradfield in Cape May would give him an alibi. Id. Chris Pappas was allowed to testify that Bradfield said that Smith had gone through with his threats and killed Reinert after he learned of Reinert's death. Id.

Other witnesses, including Susan Myers, also testified about conversations they had with Bradfield in which Bradfield described Smith's murderous intentions. Still other witnesses were allowed to testify about other out-of-court statements Bradfield had made, including statements that Smith was mentally unstable, that Smith intended to kill several persons including Reinert, and that Smith wanted to kill anyone remotely connected with the Reinert investigation.

Smith did not testify in his own defense. However, he attempted to construct a defense around the theory that Bradfield had killed Reinert at the beach in Cape May, New Jersey, where Bradfield, Myers and Pappas were when the murders occurred.

Smith's instant civil rights suit arises from the testimony of Corporal John Balshy, a Pennsylvania State Trooper who testified for the Commonwealth. Corporal Balshy was one of the investigators assigned to the Reinert investigation, and he had been present during Reinert's autopsy. He testified that before the autopsy began, he examined Reinert's body for physical evidence, and found the red fibers that were subsequently linked to the carpet in Smith's home. He also testified that he noticed what he termed a "sparkle" on the feet of Susan Reinert, and that he used rubber "lifters" to collect the material from her feet. Smith v. Holtz, 30 F. Supp. 2d at 472.[4] He used a total of

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[4] The lifter is a flat piece of rubber with adhesive on one side. When used, a clear piece of cellophane is removed to expose the adhesive surface. The lifters are so named because they usually are used to "lift" fingerprints from a crime scene. Smith v. Holtz, 30 F. Supp. 2d at 472.

five lifters to collect material. He testified that two lifters each contained one grain of this "sparkle" material, and that the material was lifted from Reinert's left foot and left heel.[5] Balshy said that he thought that the material lifted from Reinert's feet was dust or lint that was of no evidentiary value, but he conceded that it "could have been sand."[6] .Id. at 473. Balshy gave the lifters to State Trooper Ronald F.

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[5] The precise location of this material is not clear. During Smith's murder trial Balshy "testified on cross-examination that he had used the. . . lifters to remove granular particles which looked like sand from between the victim's toes." Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321, 323. However, testimony during the trial on the instant civil rights complaint caused the District Court to conclude, "no[particles] were found on the lifters used between the toes of Susan Reinert." Smith v. Holtz, 30 F. Supp. 2d at 478.

[6] This testimony was given on cross-examination. During the trial of Smith's § 1983 claims, William C. Costopoulos, Smith's criminal defense counsel, testified that he had known beforehand that Balshy would testify about finding something that could have been sand on Reinert's feet. Balshy retired from the state police in 1981 and began working as a private investigator. Apparently, Balshy provided investigative services to a member of Costopoulos' firm before Costopoulos was appointed to represent Smith as defense counsel. It was as a result of Balshy's work for Costopoulos' firm that Costopoulos learned about the lifters and learned of Balshy's observations. However, despite that knowledge, Costopoulos did not ask the Commonwealth to produce the lifters. App. 520a-522a.

We take no position on whether defense counsel's failure to demand the lifters precludes Smith's § 1983 claim.

Coyler, who was collecting evidence during the investigation. Id. The existence of sand on Ms. Reinert's feet supported Smith's theory that Reinert was killed at the seashore. However, the Commonwealth did not disclose the existence of the lifters to Smith or his trial counsel and they were never introduced into evidence.

The District Court concluded that the prosecutor, Richard Guida of the Office of the Attorney General of Pennsylvania, did not know of the lifters during the trial. 30 F. Supp. 2d at 473. However, the Pennsylvania Supreme Court concluded otherwise. That Court concluded that Guida knew of them during the trial, and that he realized their importance to the defense (though it is still not clear exactly when the Court believed he first learned of them). The Pennsylvania Supreme Court stated:

> The adhesive "lifters" used to remove and retain the sand from between the victim's toes were discovered by the Commonwealth during appellant's trial but were not disclosed to appellant despite the prosecutor's awareness of their importance. This is established by a mid-trial memorandum from the assistant attorney general who prosecuted appellant to his superior, the executive deputy attorney general stating: "It is obvious from [defense counsel's] tactics thus far that he will attempt to establish that Mrs. Reinert was killed at the shore in Cape May, New Jersey by William Bradfield, Chris Pappas, and Susan Myers. The sand, therefore, is extremely material to the defense case."

Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321, 323 (Pa. 1992) (emphasis added). However, regardless of when Guida first learned about the lifters, it is clear that Guida honed in on Balshy's testimony about lifters and attacked Balshy's credibility during Smith's murder trial despite the damning nature of so much other physical and circumstantial evidence establishing Smith's guilt. Guida went so far as to imply that Balshy had fabricated testimony and planted the lifters and particles after the autopsy. Id. Guida also presented the testimony of other State Troopers who were present at Reinert's autopsy who remembered nothing about sand or lifters. During his summation, Guida even argued that Smith had paid Trooper Balshy to concoct his testimony.[7] Id.

After the Commonwealth rested its case, State Trooper Victor Dove was assigned the duty of gathering up evidence. 30 F. Supp.2d at 473. On April 24, 1986, while gathering the evidence, he found the lifters in an evidence locker at the barracks of the state police. 615 A.2d at 323. According to the District Court, Dove waited one week, until May 1, 1986, the day after Smith's trial ended, before he told John Holtz -- the chief State Police investigator assigned to the case -- of the discovery. 30 F. Supp. 2d at 473. Holtz immediately contacted Guida, who told Holtz to bring him the lifters the next day. Holtz did so, but Guida still did not

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[7] Guida also recommended to the Deputy Executive Attorney General that Balshy be investigated for possible perjury charges. 615 A. 2d at 323. However, investigations conducted after the trial by the state police and the Office of the Attorney General concluded that there was no evidence of perjury or falsification of evidence by Balshy. Id. at 324.

disclose their existence to Smith's counsel. Rather, the lifters were turned over to the State Police Bureau of Professional Responsibility which, at Guida's recommendation, was conducting an investigation into Balshy's possible perjury. Id. That investigation was being conducted by Paul Yatron, Executive Director of the Attorney General's Office, and by Special Agent John Purcell, also of the Attorney General's Office. However, Yatron also failed to disclose the existence of the lifters to Smith's counsel.

Smith was convicted of the first-degree murders of Reinert and her children on April 30, 1986. However, just before sentencing, he filed a motion for a new trial based on after discovered evidence. He alleged that the prosecution allowed Raymond Martray (one of the inmates who testified for the Commonwealth) to testify without disclosing that Martray had open criminal charges, and expected leniency in return for testifying against Smith.

> Specifically, [Smith] learned that the Commonwealth's chief witness [Martray], who denied the existence of any bargain in exchange for his testimony against [Smith], was in fact awaiting sentencing for unrelated crimes and did in fact receive favorable treatment by the Commonwealth at his sentencing. [Smith] was thereby precluded from impeaching Mr. Martray's veracity by exposing his motivation to testify falsely against appellant in order to minimize his own punishment.

615 A.2d at 323. After an evidentiary hearing, the trial court concluded that the prosecution's misconduct did not warrant a new trial and it denied Smith's motion. Id. Thereafter, Smith was sentenced in accordance with the jury's earlier verdicts.

Smith's death sentences were subject to automatic review by the Pennsylvania Supreme Court;[8] and on appeal, Smith raised nineteen claims of error that he argued required a new trial. These included challenges to the sufficiency of the evidence, the admission of numerous hearsay statements, and the Commonwealth's failure to disclose Martray's pending criminal prosecution. 568 A.2d at 605-606.

By the time Smith's appeal was decided, Guida had resigned from the Attorney General's Office and another Assistant Attorney General, Robert Graci, had been assigned to represent the Commonwealth during the appeal process. In July of 1988, Graci first learned that the lifters existed. He immediately recognized their implication and importance, and concluded that the lifters had to be disclosed to Smith's counsel. Executive Director Yatron did not agree that the lifters had to be disclosed, but he did not attempt to dissuade Graci from doing so. Accordingly, on July 12, 1988 -- more than two years after Smith's convictions for the Reinert murders -- the Commonwealth officially informed Smith's counsel of the existence of the lifters. 615 A.2d at 324; see also Smith's Br. at 7.

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[8] See § 9711[(h) of the Pennsylvania Sentencing Code, 42 PA. CONST. ST. ANN. § 9711(h),

That disclosure prompted Smith's counsel to file a motion in the Pennsylvania Supreme Court requesting that Smith's sentences be vacated based upon prosecutorial misconduct. Smith also argued that the constitutional guarantee against double jeopardy prevented his retrial. When the motion was filed, the Pennsylvania Supreme Court had not yet decided the merits of Smith's automatic direct appeal. Inasmuch as the record did not contain the circumstances surrounding the concealment of the lifters or the Commonwealth's alleged deal with Martray, the Supreme Court remanded the matter to the trial court for an evidentiary hearing on both issues. On remand, the trial court denied Smith any relief though it concluded that the prosecution had been guilty of serious misconduct. The trial court then forwarded its findings and conclusions of law to the Pennsylvania Supreme Court. 591 A.2d 730 at 731.

On December 22, 1989, the Pennsylvania Supreme Court reversed Smith's convictions and granted him a new trial on grounds unrelated to the lifters or Martray's testimony. Commonwealth v. Smith, 523 Pa. 577, 568 A.2d 600 (Pa. 1989). It found that the evidence was sufficient to sustain Smith's convictions, 568 A.2d at 605, but held that allowing the aforementioned prejudicial hearsay statements into evidence constituted reversible error. Id. at 605-609, Inasmuch as that error warranted a new trial, the Court did not consider whether the Commonwealth's suppression of the lifters would also require a new trial. Instead, it noted that "this evidence will now be available at a subsequent trial, and the jury will be given the opportunity to assess its import within the totality of the evidence presented." Id. at 610 n.8.

However, Smith was never retried. On remand, Smith once again filed a motion arguing that the guarantee against double jeopardy prohibited retrial. The trial court denied that motion, and the Superior Court affirmed. Commonwealth v. Smith, 404 Pa. Super. 553, 591 A.2d 730 (Pa. Super, 1991). However, the Pennsylvania Supreme Court reversed despite its earlier statement that the lifters would be available at any subsequent trial. The Court held that prosecutorial misconduct barred Smith's retrial under the double jeopardy clause of the Pennsylvania Constitution, and the Court ordered Smith's discharge. Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (Pa. 1992). In doing so the Court stated:

> It is a gross understatement to conclude, as stated by the trial court and Superior Court that "neither the Attorney General's Office nor the Pennsylvania State Police can take any great pride in the manner in which this case was handled during the trial and on appeal." Deliberate failure to disclose material exculpatory physical evidence during a capital trial, intentional suppression of the evidence while arguing in favor of the death sentence on direct appeal, and the investigation of Corporal Balshy's role in the production of the evidence rather than its own role in the suppression of evidence constitute prosecutorial misconduct such as violates all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause.

615 A.2d at 324 (citation omitted).

Smith was released from prison on September 18, 1992.

II. DISTRICT COURT PROCEEDINGS

On September 15, 1993, Smith filed the instant § 1983 claim against State Troopers John Holtz, Ronald Coyler and Victor Dove; and Paul Yatron, John Purcell and William Lander of the Office of the Pennsylvania Attorney General.[9] He alleged that the defendants had deprived him of rights guaranteed under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution by deliberately concealing the lifters during his criminal trial, and his direct appeal.[10] After extensive pretrial motions not relevant to this appeal, the suit proceeded to trial. At trial, over Smith's objection, the District Court allowed the jury to determine whether the lifters were material and exculpatory evidence under Brady v. Maryland. The issue was submitted to the jury in the form of a special interrogatory. The claims against the remaining defendants, (Holtz, Dove and Yatron), were also submitted to the jury in the form of special interrogatories.

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[9] Lander was the Assistant Director of the Bureau of Criminal Investigation of the Attorney General's Office.

[10] The civil rights claims did not include any cause of action based upon the perjured testimony of Martray, and Smith voluntarily dismissed his claims against Lander and Coyler prior to trial. He voluntarily dismissed his claim against Purcell during the trial.

The jury found that the lifters were not material and exculpatory evidence, and returned answers to all special interrogatories in favor of the defendants. Thereafter, the District Court directed the entry of judgment in favor of the defendants. Post-trial motions were denied, Smith v. Holtz, 30 F. Supp. 2d. 468 (M.D. Pa. 1998), and this appeal followed.

III. DISCUSSION

Smith first argues that the District Court erred in failing to rule as a matter of law that the lifters were material and exculpatory under Brady. Second, he argues that the District Court erred in not deferring to the Pennsylvania Supreme Court's holding that the lifters were exculpatory under Brady. He also argues that the District Court erred in allowing the jury to determine whether the lifters were material and exculpatory evidence; though this is merely a restatement of his second argument. Third, he argues that even if that issue was properly submitted to the jury, the District Court erred in not informing the jury of the Pennsylvania Supreme Court's rulings on the Brady issue. Finally, Smith argues that the District Court erred in refusing to grant his motion for a new trial.

By itself, § 1983 does not create any substantive rights, but it does provide a remedy for violation of rights created by the Constitution. Baker v. McCollan, 443 U.S. 137 144 n.3, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979). Thus, Smith can not prevail on his § 1983 claim unless he can establish the denial of a constitutional right. See Parratt v. Taylor, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). The constitutional deprivations that he alleges rest

squarely upon the disclosure requirements of Brady. If suppression of the lifters does not amount to a constitutional violation under Brady, Smith can not establish a cause of action under § 1983. Accordingly, we begin our analysis with a review of Brady v. Maryland and its progeny.

In Brady v. Maryland, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court subsequently held that the prosecution's duty to disclose favorable evidence is not dependent upon a request from the accused. United States v. Agurs 427 U.S. 97, 107, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976).[11] Evidence is favorable to the accused under Brady "if it would tend to exculpate him or reduce the penalty. . . ." 373 U.S. at 87-88. The duty of disclosure is not limited to evidence the prosecutor is aware of. Rather, it includes "evidence known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995). Thus, under Brady, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Id. at.437.

Even though this duty of disclosure is tightly tethered to constitutional guarantees of due process, "the Constitution

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[11] The affirmative duty to disclose reaches impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." 514 U.S. at 436-37 (citation omitted). Rather, the prosecution's failure to disclose evidence rises to the level of a due process violation "only if the government's evidentiary suppression undermines confidence in the outcome of the trial." Id. at 434. Thus, "the question is not whether the defendant would more likely than not have received a different verdict with the [concealed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

Here, the jury determined that the lifters were not subject to disclosure under Brady, and the District Court agreed. The court stated, "Smith's argument is obviated by our conclusion that the jury properly found that the lifters were not Brady material." 30 F. Supp. 2d at 479-80. The court concluded that the lifters were not subject to Brady disclosure because they were not material, and the court reasoned that they weren't material because concealment of them did not diminish confidence in Smith's murder convictions. The District Court stated, "evidence is material if its suppression undermines confidence in the outcome of the trial." 30 F. Supp. 2d at 473 (citing Bagley, 473 U.S. 667, 678 (1985). However, the District Court's analysis improperly conflates two separate and independent components of Brady into a single inquiry. The question of whether the prosecution must disclose evidence, i.e. whether the evidence is Brady material, must be determined independently of an inquiry into whether suppression of that evidence undermines confidence in the outcome of a criminal trial, i.e., whether the evidentiary suppression constitutes a Brady violation.

Following oral argument before us in this case, the Supreme Court clarified this distinction between Brady material, and a Brady violation. In Strickler v. Greene, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the Court wrote:

> The term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence -- that is, to any suppression of so-called "Brady material" -- although, strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

119 S. Ct. at 1948. [12]

Evidence of sand on Ms. Reinert's feet is certainly consistent with Smith's claim that she was killed at the seashore -- where Bradfield was on the weekend of her death. As noted above, the prosecutor clearly thought such evidence

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[12] The District Court here obviously did not have the benefit of the holding in Strickler during the course of this trial.

exculpatory, and stated as much in the memorandum he wrote mid-trial. The prosecutor believed that when viewed in context with Smith's trial tactics, "it is obvious. . . that . . . the sand . . . is extremely material to the defense case." 615 A.2d at 323. The Pennsylvania Supreme Court also concluded that the lifters were favorable to the defense. See Id. at 324 (Condemning the prosecution's "deliberate failure to disclose material exculpatory physical evidence during a capital trial.").

We agree that the lifters were Brady material, and we therefore disagree with the District Court's ruling to the contrary. See 30 F. Supp. 2d at 479 (Agreeing with jury's determination that the lifters did not constitute Brady material). However, we nevertheless conclude that the District Court's ultimate holding that Smith failed to establish a Brady violation was correct.[13]

Smith repeatedly claims that the lifters were material and, therefore, that their concealment violated his due process right to a fair trial.[14] However, Smith's argument

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[13] Inasmuch as we hold that Smith failed to establish a due process violation, we need not now determine if the District Court erred in allowing the jury to determine if the lifters were "material and exculpatory."

[14] Although the affirmative duty to disclose is placed upon the prosecutor, we will nonetheless assume for the purposes of this appeal that investigating police officers also have an affirmative duty to disclose exculpatory evidence to an accused if only by informing the prosecutor that the evidence exists. But see Kelly v. Curtis, 21 F.3d 1544, 1552 (11th Cir. 1994). We will further

confuses "Brady material" with the Brady materiality standard required to establish a due process violation. Evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. at 678.

The lifters containing two grains of quartz crystals that could have been beach sand were favorable to Smith. They were exculpatory to the extent that they corroborated his contention that Bradfield killed Reinert at the Cape May shore. Thus, the Commonwealth had an affirmative duty to disclose them to Smith, and the Pennsylvania Supreme Court so held. We share that Court's condemnation of the prosecutorial misconduct that occurred here. The reprehensible and unethical conduct of some of those involved in that prosecution is not, however, relevant to our inquiry in determining if Smith has made out his cause of action under § 1983. Despite the prosecutorial misconduct, Smith must establish the prejudice required for the due process violation that is the sine qua non of his claim for relief. He has not done so.

Balshy testified at the civil trial as he had at Smith's criminal trial. He told the jury about noticing the sparkle on Reinert's feet and using the lifters to collect them. Although

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assume that a § 1983 claim alleging a due process violation under Brady can, therefore, be asserted against police officers. See McMillian v. Johnson, 88 F.3d 1554, 1567 n.12 (11th Cir. 1996), amended, 101 F.3d 1363 (11th Cir. 1996).

he testified at Smith's criminal trial that the material could have been sand, he testified at the trial in the instant suit that he was not qualified to make a scientific determination as to the exact nature of the material. Other witnesses testified that the material was quartz and that it was "ubiquitous" on the earth's surface.

The District Court described the testimony as follows:

> The quartz was examined by two forensic geologists. One was Christopher Fiedler of the FBI laboratory in Washington, D.C. He concluded that the quartz was "common sand," probably originating from opal or amethyst. Mr. Fiedler testified that quartz is found over most of the earth's dry surface, perhaps as much as 65% of the earth's crust. He termed the material he found "ubiquitous," and opined that he would find at least two crystals on the body or in the clothing of any person in the courtroom at the time he testified.

30 F.Supp. 2d at 478. In a supplemental footnote, the court noted: "a search of internet sources" discovered one reference that concluded: "'Quartz is the most abundant mineral in the Earth's crust. Quartz has been found in meteorites and in some rocks collected on the moon.'" Id. at n.7.[15] The court

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[15] The court's quotation was taken from a site entitled, "DesertUSA Magazine." See http://www.desertusa.com /mag98/mar/index.html.The reference is consistent with information contained in the online version of the Encyclopedia Britannica. See http://www.britannica.com/bcom/eb/article

then summarized its assessment of the impact that withholding such evidence had on the integrity of Smith's murder convictions as follows: "It appears then that having these crystals on one's feet is as indicative of a trip to the moon as a trip to the beach." Id. Although the court was clearly engaging in hyperbole, we nevertheless share its conclusion that the post-conviction disclosure of the lifters, and the particles on them, falls woefully short of undermining confidence in Smith's murder convictions.

Smith introduced the report of an expert he had retained for the hearings ordered by the Pennsylvania Supreme Court. That expert opined that the quartz found on Reinert's feet was consistent with beach sand. However, that testimony is not inconsistent with Fielder's testimony. The quartz crystals could well have been beach sand. However, even if we completely credit Smith's expert's testimony, and completely ignore Fielder's statement that the two quartz crystals are "ubiquitous," and would have been found on anyone in the courtroom, all that is established is that two grains of sand that were found on Reinert's feet were consistent with beach sand.[16]

/7/0,5716,63757+1,00.html.

[16] It could be argued that the fact that only two grains of sand were found on Ms. Reinert' foot strongly suggests that she was not killed at the beach as one would expect to find far more than two grains of sand on a victim's foot if she were killed on a beach. Thus, the quartz crystals are not unlike the proverbial "two edged sword" that cuts both for and against one's position.

As noted above, at Smith's criminal trial the Commonwealth introduced physical evidence that inexorably tied Smith to Reinert's murder and the disappearance of her two children. Given the inquiry we must make under Brady, that evidence is worth repeating. The prosecution introduced the green pin with the white "P" that Beth Ann Brook saw Karen Reinert wearing when Karen was last seen, which the jury clearly believed was Karen's, and which was recovered under the front seat of Smith's car. A hair similar to Susan Reinert's was found inside Smith's home. Carpet fibers found on Reinert's body were similar to fibers from a carpet in the basement of Smith's home. A comb found under Reinert's body in her car contained the name of Smith's military unit, and was identical to combs found in Smith's home. Finally, Smith wrote a letter to his wife asking her to dispose of the incriminating carpet, and clean the interior of his car where Karen Reinert's pin was subsequently found.

Even if we ignore the hearsay statements that were improperly admitted against Smith, and even if we also ignore Martray's suspect testimony, our confidence in Smith's convictions is not diminished in the least. We remain firmly convinced of the integrity of those guilty verdicts. Accordingly, there was no due process violation for purposes of Smith's § 1983 claim. A Brady violation is established "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine

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Nevertheless, we can not allow disclosure decisions under Brady to turn upon whether the prosecution thinks evidence is consistent only with innocence. Here, the evidence did support the defense theory, and should have been disclosed.

confidence in the verdict." Kyles, at 435. The two grains of quartz can not possibly offset the evidence of Smith's guilt that was presented to the jury that convicted him of murdering Susan Reinert and her two children. Smith has not come close to demonstrating "a reasonable probability that the criminal jury would have returned a different verdict if the information had been disclosed . . . . Buehl v. Vaughn, 166 F.3d 163, 181 (3d Cir. 1999). Accordingly, he has not established that withholding Brady material resulted in a Brady violation, and we can therefore dispose of Smith's remaining issues with only brief discussion.

In light of our discussion, Smith's claim that the District Court erred by not finding as a matter of law that the lifters were material and exculpatory is meritless. His assertion that the District Court erred in submitting that issue to the jury is therefore also meritless.[17] In fact, that argument elevates form over substance because the District Court expressly found that "had the question been left to the court, we would have agreed with the jury's conclusion." 30 F. Supp. 2d at 479. Therefore the District Court clearly stated that it would have decided that the lifters were immaterial as a matter of law. We disagree with that conclusion insofar as the court believed the lifters were not what is generically referred to as Brady material. However, we conclude the lifters were immaterial in that they would not have changed the outcome of Smith's criminal trial and their suppression was not, therefore, a Brady violation.

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[17] As noted above, this is merely a restatement of the preceding argument.

Smith's argument that the District Court erred in not deferring to the Pennsylvania Supreme Court's decision on the Brady issue or, in the alternative, that it should have allowed the jury to learn of that decision is also meritless. Smith claims that the Pennsylvania Supreme Court was "the only court which conducted a full review of the evidence presented at plaintiff's criminal trial, and reviewed the entire evidentiary record regarding the lifters, [and] concluded that they were Brady evidence." Smith's Br. at 18. His argument refers to the Pennsylvania Supreme Court's holding that prosecutorial misconduct barred Smith's retrial. See 532 Pa. 177, 615 A.2d 321 (Pa.1992).

Smith misstates the Pennsylvania Supreme Court's decision. That court never performed an analysis to determine if the Commonwealth's unethical conduct constituted a Brady violation. Rather, the Court focused upon whether the Commonwealth's conduct during Smith's murder trial (including the prosecutor's failure to disclose Martray's pending criminal charges), the continued suppression of favorable evidence while arguing in favor of Smith's execution during the appellate process, and the Commonwealth's excoriation and investigation of Corporal Balshy, constituted the kind of egregious prosecutorial overreaching that precluded Smith's retrial under the double jeopardy clause of the Pennsylvania Constitution. The Court answered that inquiry in the affirmative, but it never inquired into whether the Commonwealth's conduct undermined confidence in the murder convictions, and it never held that the Commonwealth's conduct amounted to a Brady violation.

Smith also argues that the doctrine of offensive collateral estoppel barred relitigation of the materiality of the

lifters because their materiality and exculpatory nature had already been established by the Pennsylvania Supreme Court. However, Smith could not prevail on this argument even if the Pennsylvania Supreme Court had decided that issue as Smith says. As we have stated, the Pennsylvania Supreme Court did not address the due process component of a Brady violation. Therefore, the doctrine does not apply.[18]

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[18] Here, several factors preclude the application of offensive collateral estoppel. Neither Holtz, nor Dove, nor Yatron made the decision not to disclose the existence of the lifters. Although Dove waited one week before he told anyone about the lifters, he did eventually turn them over to Holtz who immediately informed Guida. It was Guida, the prosecutor, who made the decision not to disclose the lifters to Smith's counsel. At the time he made that decision Guida represented the Commonwealth's interests, not the interests of Holtz, Dove or Yatron. However, Guida, as prosecutor, has absolute immunity from liability in Smith's § 1983 action so long as he was functioning in his prosecutorial capacity when he made that decision. Imbler v. Pachtman, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976); see also Buckley v. Fitzsimmons, 509 U.S. 259, 125 L. Ed. 2d 209, 113 S. Ct. 2606 (1993) (prosecutor has absolute immunity in § 1983 action for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial). Since Guida has absolute immunity, the State Troopers and Attorney General personnel are the only Commonwealth actors Smith can sue under § 1983. See Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir. 1981).

The Pennsylvania Supreme Court did not blame any one individual for the unethical misconduct that it found. Instead, it cast blame upon "the Commonwealth" in general, and "the prosecutor" in particular, Smith's civil action is against the defendants in their

Finally, Smith makes three arguments in support of his contention that the District Court erred in denying his motion for a new trial. Smith argues that he is entitled to a new trial because the jury's findings in favor of Dove and Yatron are against the weight of the evidence. As a general rule, "we review the district court's order ruling on a motion for a new trial for abuse of discretion unless the court's denial is based on the application of a legal precept, in which case the standard of review is plenary." Rotondo v. Keene Corp., 956 F.2d 436, 438 (3d Cir. 1992). "The district court ought to grant a new trial on the basis that the verdict was against the weight of the evidence only where a miscarriage of justice would result if the verdict were to stand." Klein v. Hollings, 992 F.2d 1285, 1290 (3d Cir, 1993). For the reasons we have previously discussed, the jury's findings here clearly do not result in a miscarriage of justice, and Smith's argument to the contrary is frivolous.

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individual capacities, but they are not in privity with the government in a prior criminal prosecution when sued in their individual capacities. See Morgan v. Gertz, 166 F.3d 1307, 1309 (10th Cir. 1999); see also 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4458, at 508 (1981) ("[A] judgment against a government does not bind its officials in subsequent litigation that asserts a personal liability against the officials."). Therefore, the District Court did not abuse its discretion in refusing to apply the doctrine of offensive collateral estoppel. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979). (The application of the doctrine of collateral estoppel is within the "broad discretion" of the trial court.)

Absent a showing that the suppression of the lifters constituted a Brady violation, Dove and Yatron are not liable to Smith under § 1983. Equally without merit is Smith's argument that the District Court erred by permitting the defendants here to introduce certain inculpatory evidence that supported the Commonwealth's criminal case against him. Smith argues that the only relevant inquiry at his § 1983 trial was whether the defendants intentionally suppressed evidence. However, as we have already explained, this misstates the relevant inquiry.

> Essentially, . . ., the question we must resolve is: when viewed as a whole and in light of the substance of the prosecution's case, did the government's failure to provide. . . Brady. . . evidence to the defense. . . lead to an untrustworthy guilty verdict. . . ?

U.S. v. Pelullo, 105 F.3d 117, 123 (3d Cir. 1997) (emphasis added). Here, the answer is a resounding "no." There is nothing untrustworthy about Smith's conviction for murder. Therefore, even if the District Court erred in allowing additional evidence of guilt to be introduced during Smith's civil trial, the error was harmless.

Finally, Smith argues that the District Court erred in not granting his motion to bifurcate his trial into liability and damages phases. Smith apparently actually asked the court to "trifurcate" the trial into three phases to separately determine the "due process violation, injury, and damages." 30 F. Supp. 2d at 480. We review the court's refusal to "bifurcate" the trial for an abuse of discretion. Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98, 105 (3d Cir. 1992). Smith

has not established the court's determination of the best way to proceed was an abuse of discretion. Moreover, inasmuch as he did not establish a Brady violation, we fail to see how he was prejudiced by the court's decision to deny Smith's request to divide the trial into three separate phases.

IV.

Accordingly, we will affirm the order of the District Court. Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished by consideration of the suppressed lifters and quartz particles, and Smith has therefore not established that he is entitled to compensation for the unethical conduct of some of those involved in the prosecution.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Filed April 13, 2000]

No. 99-7046

JAY C. SMITH,
Appellant

v.

JOHN J. HOLTZ, Bureau of Technical Services, Pennsylvania State Police; RONALD F. COYLER, Bureau of Technical Services, Pennsylvania State Police; VICTOR DOVE; JOHN J. PURCELL, Special Agent in Charge, Central Regional Office, Bureau of Criminal Investigations, Office of the Attorney General; WILLIAM J. LANDER, Bureau of Criminal Investigations, Office of the Attorney General; PAUL YATRON

On Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. Civil No. 93-cv-01428
District Judge: Hon. James F. McClure, Jr.

Argued: July 27, 1999

Present: SLOVITER, NYGAARD and MCKEE
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on July 27, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 14, 1998, be, and the same is hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/_____
Acting Clerk

Dated: April 13, 2000

APPENDIX C

UNITED STATES DISTRICT COURT
M.D. PENNSYLVANIA

[Filed December 14, 1998]

No. 4:CV-93-1428

JAY C. SMITH,
Plaintiff

v.

JOHN J. HOLTZ, et al.
Defendants

MEMORANDUM

Gerald J. Williams, Williams and Cuker, Philadelphia, PA, Leslie M. Fields, Costopoulos Foster & Fields, Lemoyne, PA, for plaintiff.

Gregory R. Neuhauser, Senior Deputy Attorney General, Commonwealth of Pennsylvania, Office of the Attorney General, Litigation Section, Harrisburg, PA, for defendants.

McCLURE, District Judge.

BACKGROUND:

This unique case is before the court on post-trial motions following the return of a verdict in favor of two former troopers of the Pennsylvania State Police and an attorney for the Pennsylvania, Office of the Attorney General. The issues presented involve primarily whether certain evidence was material and exculpatory within the meaning of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), whether this court erred with respect to certain evidentiary rulings and whether the jury verdict was unreasonable in light of the evidence presented.

On September 15, 1993, plaintiff Jay C. Smith commenced this action with the filing of a complaint pursuant to 42 U.S.C. § 1983. Smith alleged that he was tried and sentenced to death in violation of the Constitution of the United States due to prosecutorial and police misconduct. His conviction in 1986 was reversed on direct appeal due to the admission of hearsay. The Supreme Court of Pennsylvania eventually determined that the Double Jeopardy Clause of the Pennsylvania Constitution barred a re-trial. The latter ruling was based on police and prosecutorial misconduct relating to the suppression of evidence.

At the time of trial, defendants were John J. Holtz, Victor Dove, John J. Purcell, and Paul Yatron. Holtz and Dove were members of the Pennsylvania State Police involved in the murder investigation. Purcell was with the State Police office which investigated perjury charges against another Trooper. Yatron was a supervising attorney with the Office of the Attorney General. Two other defendants, Ronald Colyer

and William Lander, were dismissed prior to trial, and the claims against Purcell were withdrawn during trial.

On September 4, 1998, a jury returned a verdict in favor of defendants on all claims and issues presented for consideration. Before the court is Smith's motion for judgment as a matter of law, also called a motion for judgment notwithstanding the verdict, or for a new trial.

***DISCUSSION*:**

I. STANDARD

The applicable rule provides:

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment--and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of

law; . . .

Fed.R.Civ.P. 50(b)(1). Smith's motion is brought under both Rule 50 and Fed.R.Civ.P. 59.

Whether made under Rule 50(a) or 50(b), a motion for judgment as a matter of law should be granted only if, viewing the evidence in the light most favorable to the non-movant, and giving the non-movant the advantage of every, reasonable and fair inference, there is insufficient evidence from which a jury reasonably could find against the movant. The movant is entitled to judgment if there is no question of material fact for the jury and any verdict other than the one directed would be erroneous under the governing law. *Beck v. City of Pittsburgh.* 89 F.3d 966, 970-971 (3d Cir. 1996), *cert.* d*enied,* ___ U.S. ___, 117 S.Ct. 1086, 137 L.Ed.2d 219 (1997); *McDaniels v. Flick;* 59 F.3d 446, 453 (3d Cir. 1995), *cert. denied,* 516 U.S. 1146, 116 S.Ct. 1017, 134 L.Ed.2d 97 (1996).

A motion for a new trial may be granted if the verdict is against the clear weight of the evidence and a miscarriage of justice would result if the verdict were allowed to stand. *Delli Santi v. CNA Insurance Cos.,* 88 F.3d 192, 201 (3d Cir.1996). A district court has more discretion to scrutinize a jury's verdict when a case is factually complex and potentially outside a layman's understanding. *Id.*

When Smith moved for judgment as a matter of law at the close of the evidence, the court denied the motion and indicated that it would consider a renewed motion under Fed. R.Civ. P. 50(b)(1). Since the verdict was for the defense,

Smith properly has brought the instant motion under that provision.

II. STATEMENT OF FACTS

There have been a number of opinions published related to this case, either the original criminal proceeding or the civil matters arising therefrom. *See, e.g., Commonwealth v. Smith,* 523 Pa. 577, 568 A.2d 600 (1989) (vacating Smith's conviction); *Commonwealth v. Smith*, 404 Pa.Super. 553, 591 A.2d 730 (1991) (re-trial not barred by Double Jeopardy Clause); *Commonwealth v. Smith,* 532 Pa. 177, 615 A.2d 321 (1992) (reversing previously cited opinion and holding that Double Jeopardy Clause barred retrial due to prosecutorial misconduct); *Smith v. Wambaugh, 22* Pa.D. & C.4th 219 (Pa. Com.Pl. Huntingdon 1993), *aff'd,* 440 Pa.Super. 640, 654 A.2d 606 (1994) (table), *allocatur denied*, 540 Pa. 641, 659 A.2d 560 (1995) (table); *Smith. v. Holtz, 856* F.Supp. 227 (M.D.Pa.1994), *reconsideration denied,* 879 F.Supp. 435 (M.D.Pa.1995), *aff'd,* 87 F.3d 108 (3d Cir.), *cert.denied sub nom. Wambaugh. v. Smith,* ___ U.S. ___, 117 S. Ct. 611, 136 L.Ed2d 536 (1996); *Smith v. Wambaugh,* 887 F.Supp. 752 (M.D.Pa.1995), *aff'd sub nom. Smith v. Holtz,* 87 F.3d 108 (3d Cir.), *cert. denied,* ___ U.S. ___, 117 S.Ct. 611, 136 L.Ed.2d 536 (1996). A more detailed recitation of the facts of this case may be found in those opinions. Also, several books have been published on the case, including *Echoes in the Darkness* by Joseph Wambaugh and *Principal Suspect: The True Story of Dr. Jay Smith and the Main Line Murders* by

William C. Costopoulos.[1] We limit our recitation of the facts to those necessary to dispose of the motion and to place the motion into context.

On Monday, June 25, 1979, the body of Susan Reinert, an English teacher at the Upper Merion High School, was discovered outside the Host Inn in Swatara Township, Dauphin County, Pennsylvania. The body showed evidence that Ms. Reinert had been chained and beaten, and her nude body was left lying in the fetal position in the back of her car, with the hatchback open. The cause of death was determined to be asphyxiation from an overdose of morphine. Susan Reinert was last seen alive the preceding Friday leaving her home with her children, Karen and Michael. The children were never seen again, and are presumed dead.[2]

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[1] Mr. Wambaugh was the defendant in a companion case to the instant case. The court recently granted summary judgment in his favor, finding no evidence to support a conspiracy between Mr. Wambaugh and any defendant in this case. *Smith v. Wambaugh,* No. 1:CV-94-1470, 1998 WL 864434, 29 F.Supp.2d 222 (M.D.Pa. filed December 8, 1998). Other opinions in that case are cited above. Mr. Costopoulos was Smith's defense attorney in the state criminal proceedings.

[2] Recent news reports indicate that there may be a clue to the whereabouts of the bodies of Karen and Michael Reinert. A 1986 photograph has been found among William Bradfield's belongings which shows a stone marker in a wooded area. The Pennsylvania State Police are investigating but are unsure of the significance of the marker. *Reinert evidence revealed,* The Harrisburg Patriot, November 18, 1998, at A1, 1998 WL 6486656. Neither the marker nor any other evidence of bodies has been located.

The chief investigator in the case during its initial stages was Joseph Van Nort, a criminal investigator with the Pennsylvania State Police. The case received a great deal of publicity due to the lurid details which came to light. Those details need not be repeated here. Eventually, a fellow teacher in the English department at Upper Merion, William S. Bradfield, was arrested for the murder. Bradfield was the named beneficiary of Susan Reinert's will and life insurance policies. He was tried and convicted of the murders, and sentenced to life in prison. He died there earlier this year.

In 1986, Jay C. Smith, a former principal at Upper Merion, was arrested for the murders, tried, convicted, and sentenced to death. At the time of his arrest, Smith had been serving a sentence for robberies. In 1989, the conviction and sentence were overturned by the Supreme Court of Pennsylvania, which found error in the admission of statements by Bradfield which constituted hearsay. After further proceedings, the Supreme Court found that prosecutorial misconduct related to newly discovered evidence barred a second trial.

During the early stages of the criminal investigation, Susan Reinert's ex-husband sent newspaper clippings to defendant Joseph Wambaugh, an author who specializes in true crime books and fictional stories involving police. Wambaugh himself is a former policeman. Wambaugh became interested in the story and contacted Van Nort about the possibility of a book. He offered $50,000.00 to Van Nort for a personal depiction waiver, which would release Wambaugh from liability for the manner in which Van Nort was portrayed. Van Nort died before any payment was made or waiver executed.

Van Nort's partner, John (Jack) Holtz became the lead investigator and found a letter from Wambaugh to Van Nort which outlined their agreement. Holtz later entered into an identical agreement with Wambaugh and received the $50,000.00. It is the agreement and related payment which Smith claims served as the motivation for the suppression of the evidence which is the subject of this action under § 1983.

The specific evidence at issue consists of two grains of quartz found on the feet of Susan Reinert during the autopsy. Before the coroner began his work on the body, a state trooper named John Balshy (now retired) did a preliminary examination of the body for physical evidence. He found, for instance, red fibers which were similar to fibers from a carpet, a piece of which was found in the basement of Smith's former residence. He also noticed what he termed a "sparkle" on the feet of Susan Reinert. He used rubber "lifters," so named because they usually are used to "lift" fingerprints from a crime scene, to collect material from the feet. The lifter consists of a flat piece of rubber with adhesive on one side. A clear piece of cellophane is removed to expose the adhesive surface. Balshy did so, folded the lifters so that only the adhesive surface was exposed, and placed the lifters between the toes of Susan Reinert's body. He also used the lifters, in the original flat form, to lift material from elsewhere on the feet.

At the time of the autopsy, Balshy thought that the material was dust or lint, and of little or no evidentiary value. He gave the lifters to Colyer, who was collecting evidence, and did not see them again until much later.

At Smith's criminal trial, part of the defense theory was that Susan Reinert was killed at the shore resort of Cape May, New Jersey. Bradfield and a number of rather gullible cohorts had gathered there on the weekend of the murder, with Bradfield specifically stating that he wanted an alibi in case Smith should try to kill Susan Reinert that weekend. *The* prosecution's theory was that Bradfield and Smith had conspired to commit the murder, with Bradfield assisting with the original abduction of Susan, Karen, and Michael Reinert during a time not covered by his alibi. According to the prosecution, Smith then committed the murders (or at least Susan Reinert's) with the expectation that he would share in the proceeds of Susan Reinert's will and life insurance, of which Bradfield was the beneficiary.

The lifters themselves never appeared in evidence at Smith's trial, but Balshy testified that he had used the lifters. He stated that he did not know what the material was that had caught his attention, but that it "could have been sand." The relevance of finding sand on the feet of the victim is that it would support the defense theory of a murder at a seaside resort, i.e a place with a beach.

In reaction to Balshy's testimony, the prosecutor, Richard Gulda of the Office of the Attorney General, exploded. He attacked Balshy's credibility despite the importance of the fibers found by Balshy at the same time that he found the material which could have been sand. It appears that Gulda had never been told about the lifters, and did not find out about their discovery until after the trial had ended.

According to defendant Victor Dove, after the Commonwealth rested its case against Smith, he had the duty

of gathering up the evidence which had been collected but not given to Guida for introduction into evidence. While doing so, he found the lifters. Dove did not contact anyone immediately about the find, but went to defendant Holtz on the night the trial ended to inform him of the discovery. Holtz contacted Guida, who in turn directed Holtz' to bring the lifters to him (Guida) the next day. When Holtz did so, Guida concluded that the lifters were not material. They were turned over to the State Police Bureau of Professional Responsibility, which, at Guida's request, was conducting an investigation into possible perjury by Balshy. Once that investigation was concluded, the lifters remained in the investigative file until 1988.

While the case was still on direct appeal, counsel for Smith learned that the lifters existed, demanded disclosure, and finally received official notification on July 12, 1988. A motion to dismiss the case related to the evidence was presented to the Supreme Court, but the motion was deferred for consideration on remand. On remand, the trial court found misconduct related to the suppression of the lifters and to the suppression of impeachment evidence. However, it found that retrial was not barred. The Superior Court affirmed, but the Supreme Court of Pennsylvania reversed and ordered Smith freed from custody.

This civil action followed.

III. THE LIFTERS AS BRADY MATERIAL

When the Supreme Court of Pennsylvania ruled that there was misconduct by the police and prosecution sufficient to bar a retrial, it based its holding on two grounds, the

suppression of the lifters and the failure to disclose impeachment material for a Commonwealth witness. The latter referred to potentially favorable treatment at a pending sentencing for the witness in return for his testimony. *See generally Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (impeachment material falls within purview of *Brady)*. Since the complaint in the instant case was limited to the suppression of the lifters, the favorable treatment for the witness was not an issue in this case except as evidence of the prosecution's intent/malice in its treatment of Smith. We therefore will limit our discussion to the lifters as *Brady* material.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* at 87, 83 S.Ct. 1194. Evidence is favorable to the accused if it would tend to exculpate him or to reduce the penalty. *Brady* at 87-88, 83 S.Ct. 1194. Evidence is material if its suppression undermines confidence in the outcome of the trial. *United States v. Bagley,* 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

The arguments presented by Smith may be stated as follows:

(1) This court was bound by the holding of the Supreme Court of Pennsylvania that the lifters were material and exculpatory;

(2) The issue of whether the lifters were material and exculpatory is a question for the court and not a

question for the jury, despite its nature as a mixed question of law and fact;

(3) Assuming the issue to be one for the court, the court was bound to find that the lifters were material and exculpatory evidence based on the overwhelming weight of the evidence;

(4) Assuming the issue to be one for the jury, the jury was bound to find that the lifters were material and exculpatory based on the overwhelming weight of the evidence;

(5) The error was not harmless.

We conclude that we were not bound by the holdings of the state courts, that the question was properly submitted to the jury, that the verdict was not against the weight of the evidence, and that, if the question is one for the court we agree with the verdict of the jury. Based on the foregoing, we do not reach the question of harmless error.

We turn first to the question of whether we are bound by the holding of the state courts.

(1) Preclusive Effect of State Court Proceedings

Smith contends that we are bound by the principle of collateral estoppel, also called issue preclusion, to adhere to the holding of the Supreme Court of Pennsylvania that the lifters are material and exculpatory. Specifically, he seeks to use "offensive collateral estoppel" to bar relitigation of the issue.

Neither the court nor the parties points to an opinion of the Third Circuit indicating that a federal district court, hearing a civil action under § 1983, is bound by the holding of a state court in underlying or related criminal proceedings. However, at least two courts of appeals and one district court have held that a federal district court is not bound, or at least not necessarily bound, to follow the state court's holding under such circumstances.

"Offensive collateral estoppel occurs whenever a plaintiff seeks to estop a defendant from 'relitigating an issue which the defendant previously litigated and lost against another plaintiff." *Raytech Corp. v. White*, 54 F.3d 187, 190 n. 5 (3d Cir.) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct 645, 58 L.Ed.2d 552 (1979)), *cert denied*, 516 U.S. 914, 116 S.Ct. 302, 133 L.Ed.2d 207 (1995). The doctrine of collateral estoppel may be invoked when the following circumstances are present:

> (1) The issue decided in the prior adjudication was identical with the one presented in the later action;
>
> (2) There was a final judgment on the merits;
>
> (3) The party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and
>
> (4) The party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in the prior action.

Temple Univ. v. White, 941 F.2d 201,212 (3d Cir. 1991), *cert denied sub nom. Snider v. Temple Univ.,* 502 U.S. 1032, 112 S.Ct. 873, 116 L.Ed.2d 778 (1992).[3] Collateral estoppel is inappropriate when the facts essential to the earlier litigation have changed or if application of the doctrine would work unfairness to the party against whom it is asserted. *Raytech* at 190. That the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue is a "central tenet of issue preclusion." *In re Braen*, 900 F.2d 621, 628 (3d Cir. 1990), *cert. denied sub nom. Braen v. Laganella,* 498 U.S. 1066, 111 S.Ct. 782, 112 L.Ed.2d S45 (1991).

In *Duncan v. Clements,* 744 F.2d 48 (8th Cir.1984), the issue was whether there was probable cause to search and arrest the plaintiff. The plaintiff had moved to suppress evidence found in the search, and the motion was granted. The case was dismissed by the prosecution for lack of evidence, i.e. the same evidence which had been suppressed. Applying the same factors recited above, *id.* at 51, the Eighth Circuit held that the police officer who conducted the search was not collaterally estopped from relitigating the issue of probable cause, reasoning.

> The State of Missouri, not [the defendant police officer], was a party to [the plaintiff]'s criminal prosecution. We therefore would have to find that [defendant] was in privity with the State of Missouri in order to

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[3] These elements are stated in a different form in *Raytech* at 190.

estop [defendant] from relitigating the constitutional issue. Although Missouri courts have not addressed the precise problem confronting us, they have noted that privity does not exist merely because a person "happen[s] to be interested in the same question, or in proving or disproving the same state of facts." *America Polled Hereford Association v. Kansas City,* 626 S.W.2d 237, 241 (Mo. 1982). It is not enough that both the state and Schaeffer were interested in proving that probable cause existed to make the arrest and conduct the search and seizure.

"[P]rivity within the meaning of the doctrine of issue preclusion is privity as it exists in relation to an identity of interests in the subject matter of the litigation." *Id.* The interests of the State of Missouri in a criminal proceeding are not identical to those of an individual officer such as [defendant]. In a different context, the Supreme Court noted: "'[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant'" *Standefer v. United States*, 447 U.S. 10, 25, 100 S.Ct. 1999, 2008, 64 L.Ed.2d 689 (1980) (quoting *United States v. Standefer,* 610 F.2d 1076, 1093 (3d Cir. 1979) (defendant accused of aiding and abetting in

commission of criminal offense may be convicted despite the prior acquittal of the alleged perpetrator)). Only the State of Missouri, not Schaeffer, had an interest in the outcome of the criminal proceeding against Duncan; Schaeffer's personal interests were not at stake . . . .

Moreover, [defendant] clearly had no control over nor did he substantially participate in control of the state's presentation of its case. *See* Restatement (Second) of Judgments § 39 (1982); *Davis v. Eide,* 439 F.2d 1077, 1078 (9th Cir.), *cert. denied*, 404 U.S. 843, 92 S.Ct. 139, 30 L.Ed.2d 78 (1971). [Plaintiff] asserts, for example, that [defendant] "was represented by a state prosecutor throughout the hearing. . ." Brief for appellant at 10. That assertion is not supported by the facts. The prosecutor represented the State of Missouri--not [defendant]. [Defendant] had no control over the prosecutor and did not make decisions with regard to the prosecution. [Defendant]'s role at the suppression hearing was simply that of a witness for the prosecution. He could not have appealed the state court's decision on the motion to suppress and he had no control over the prosecutor's decision to enter a nolle prosequi on the criminal charge. We hold, therefore, that [defendant] did not have a full and fair opportunity to litigate at the suppression hearing the constitutionality of the December

> 11, 1980 arrest and search of [plaintiff] and seizure of items from him.

Duncan at 52-53 (footnote omitted).

The principle that a prosecutor does not represent the interests of a police officer later subject to personal liability for damages also was a basis for the court's decision in *Nieblas v. Derbyshira* 1996 WL 331086 (E.D.N.Y. filed June 11, 1996). Specifically, the court stated, "A witness is not a party to plaintiffs criminal prosecution . . . . In the earlier proceeding, neither defendant had (or should have, for that matter) a personal stake in the prosecution's outcome." Id. at *3 (citation omitted).

In addition, the court stated sound policy reasons for not applying collateral estoppel: the conflicts which would arise between police and prosecutors. One example is the case in which a prosecutor acquiesces in the unlawfulness of a search because other evidence is sufficient to obtain a conviction or because there is a risk of reversal. The holding that the search would be illegal would be binding on the officer despite the fact that it was technically, not substantively, litigated, an unfair result for the policeman. On the other hand, if the prosecutor litigated the issue and lost, the unfairness to the officer can be eliminated only by pursuing an appeal, effectively putting the prosecution on hold during the resolution of collateral issues. *Id.*

A slightly different approach was taken by the Seventh Circuit in *Kraushaar v. Flanigan*, 45 F.3d 1040 (7th Cir. 1995). In that case, an arrest for driving under the influence was quashed by state courts, after which the driver brought

suit under § 1983. The plaintiff argued that the defendants were collaterally estopped from relitigating the issue of probable cause for the arrest. The Seventh Circuit held that arresting officers could not be found to be in privity with the state prosecutor when the officers were not even called as witnesses during the criminal proceedings (the prosecutor relied on an officer's report). *Id.* at 1050-1051. In its concluding statement, the court added that, not only did the officer not testify, he "did not have the opportunity to present testimony from other witnesses to corroborate his own observations," *id.* at 1051, and therefore did not have a full and fair opportunity to litigate the issue of probable cause.

These principles apply in this case. During the prosecution, Guida represented the interests of the Commonwealth, not the personal interests of the State Troopers, or even the personal interests of defendant Yatron, another prosecutor in the Office of the Attorney General. His goal was to obtain a conviction of Smith, and not the litigation of issues such as whether the lifters were *Brad*y material, at least not directly. Moreover, once he learned that the lifters had been found, Guida decided not to disclose them because he did not feel that they were *Brady* material, a decision over which the Trooper defendants had no control.

After Graci had the case and was informed of the existence of the lifters, he concluded that they were *Brady* material subject to disclosure. Once again, the Trooper defendants had no control over the decision. Moreover, since Graci had concluded that the lifters were *Brady* material, the issue was not litigated in the post-trial hearings. The question there was whether there was police and prosecutorial misconduct sufficient to bar a second trial. In combination

with the suppression of the other evidence, i.e. the material which could have been used to impeach a Commonwealth witness, the state courts found such misconduct. However, although they may have testified in hearings related to the misconduct, defendants in this case had no say in the conduct of that litigation. The only defendant who had any authority in the matter, Yatron, properly left the litigation to the prosecutor handling the case, Graci.

Smith claims that the relationship between defendants and the prosecution was "symbiotic." Plaintiffs Brief at 9 n.4. As discussed above, we disagree with this characterization. The close working relationship which necessarily exists between police and prosecutors does not change the fact that they are different offices and perform distinct functions. Most importantly, even assuming such a symbiosis existed, the decision by Graci to concede that the lifters were *Brady* material undercut the relationship for present purposes.

Smith also argues that the court should adopt the holding of the state courts in the interest of comity. Comity does outweigh the rights of individual defendants to litigate an issue. Finally, Smith mentions, without great development of the argument, that we are bound by the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, to hold that the lifters were *Brady* material. *See also* 28 U.S.C. § 1738 (federal statute governing full faith and credit). A federal court is required to give preclusive effect, whether res judicata or collateral estoppel, the judgment of a state court to the same extent as would be given under the law of the state. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 134 F.3d 133, 141-142 (3d Cir. 1998); *Avellino v. Herron,* 991 F.Supp. 722, 728 (E.D.Pa.1997). Pennsylvania

applies the same principles of collateral estoppel as discussed above. *Avellino* at 728 (citing *Allegheny Int'l Inc. v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1431 n. 17 (3d Cir. 1994): *Gregory v. Chehi*, 843 F.2d 111 (3d Cir. 1988)). For the same reasons that collateral estoppel does not apply, then, defendants are not barred by the principles of full faith and credit from litigating the issue of whether the lifters are *Brady* material.

We conclude that the use of offensive collateral estoppel is inappropriate. Policemen do not have any control over state prosecutors as to the conduct of criminal proceedings, and prosecutors represent the people of a state or county generally, not individual officials who may be subject to liability for damages at a later time. The issue in this ease was not the focus of the earlier proceedings which Smith seeks to use offensively to collaterally estop relitigation of the issue. Permitting the use of collateral estoppel in this manner would place burdens on the state criminal proceedings in the form of unfairness to police or multiplying the proceedings. We hold that the doctrine of collateral estoppel does not apply in these circumstances.[4]

(2) Question for Court or Jury

Smith next argues that the court erred in submitting to the jury the question of whether the lifters were *Brady*

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[4] Smith makes several arguments in this regard based on the language of the opinion of the Supreme Court of Pennsylvania. We do not address that language or the opinion generally because it is not material to the issue of collateral estoppel and because the effect of the opinion is discussed below.

material. The first question asked of the jury on the verdict slip was, "Were the five lifters in question material and exculpatory evidence relative to the trial of plaintiff Jay C. Smith in April, 1986?" The jury answered "No" to this question.

We agree with Smith that the question of whether evidence constitutes *Brady* material is a mixed question of law and fact. *Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir.), *cert. denied,* 479 U.S. 962, 107 S.Ct. 458, 93 L.Ed.2d 404 (1986). Generally, questions related to *Brady* material would be determined by the court because motions to suppress and for discovery are made pre-trial. *See generally* Fed. R. Civ. P. 12(b)(3), (4). It should be emphasized that such motions "are capable of determination without the trial of the general issue," Rule 12(b), i.e. the purpose for which a jury is selected, and therefore a jury would not be involved. Therefore, the lack of jury determination during the criminal proceedings does not foreclose determination by a jury in later, related, civil proceedings.

Smith contends that the determination is a technical one for which only the court is qualified. We disagree: The exculpatory nature of evidence is not difficult to discern. If the evidence favors the defendant in criminal proceedings, as by directly supporting the defendant's non-involvement or by supporting a theory of the case inconsistent with the prosecution's, it is exculpatory. A jury inherently makes such

a determination in nearly every criminal case which reaches the verdict stage).[5]

In discussing materiality in the context of a false statement within the jurisdiction of a government agency, the Supreme Court pointed out that mixed questions of law and fact are "typically resolved by juries." *United States v. Gaudin,* 515 U.S. 506, 512, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). It added, "Indeed, our cases have recognized in other contexts that the materiality inquiry involving as it does delicate assessments of the inferences a reasonable decisionmaker would draw from a given set of facts and the significance of those inferences to him is peculiarly one for the trier of fact." *Id.* (internal punctuation and citations omitted).

Smith contends that the court indicated that the verdict would be treated as advisory and that the court would make the final determination on the issue of whether the lifters were *Brady* material. He also points to the parties' agreement that the issue was one for the court. Stipulation of the Parties filed August 17, 1998.

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[5] Discussed below is the case of *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). The Supreme Court pointed out in that case that a jury necessarily makes a legal determination when it finds a criminal defendant guilty or not guilty, because it must make the factual determination as to whether the defendant committed the acts constituting the elements of the offense and then must determine whether those acts constitute the offense. *Id.* at 512-513, 115 S.Ct. 2310.

Actually, the court indicated that it was not clear whether the issue was one for the court or for the jury, and that the parties had brought the matter to the court's attention at a late date. We took the matter under advisement and indicated that the issue would be submitted to the jury and, if we determined that the question was purely legal, the verdict, would be treated as advisory. The court at no time made a final determination that the verdict would be advisory. Regardless, Smith was on notice that the factual basis for the ruling had to be established whether the court or the jury would make the final determination, and Smith cannot claim to have been prejudiced in any way from his misperception of the court's statement.

We conclude that the issue of whether the lifters constituted *Brady* material was properly submitted to the jury.

(3) Weight of the Evidence

We next turn to the question of whether the evidence supported the jury's verdict. In so doing, we address both the questions numbered (3) and (4), above, because the question of the reasonableness of the verdict is the same whether returned by the jury or by the court.

Before turning to the potential effect of the lifters on the criminal trial, we examine first the nature of what was found and preserved on the lifters. According to Balshy, he noticed a "sparkle" when he examined the feet of Susan Reinert and used the lifters to collect whatever material had caused the sparkle. He could not determine from examination of the lifters what the material was, and he conceded that he is not a forensic geologist or other scientist qualified to make

that determination. Other testimony supported the fact that no evidence of value was visible on the lifters either with the naked eye or with a magnifying glass used to examine fingerprints. When the lifters were found, the nature of the material obviously became a matter of significant concern. The lifters were found later to contain, in addition to extraneous matter which was mostly organic in nature, one crystal of quartz on two of the lifters. That is, of the five lifters, there was a total of two grains or crystals of quartz. Writing on the lifters indicates that the crystals were found on the left foot and the left foot heel. No quartz was found on the lifters used between the toes of Susan Reinert. The quartz that was found had to be examined microscopically.

The quartz was examined by two forensic geologists. One was Christopher Fiedler of the FBI laboratory in Washington, D.C. He concluded that the quartz was "common sand," probably originating from opal or amethyst. Mr. Fiedler testified that quartz is found over most of the earth's dry surface, perhaps as much as 65% of the earth's crust. He termed the material he found "ubiquitous,"[6] and opined that he would find at least two crystals on the body or in the clothing of any person in the courtroom at the time that he testified.[7]

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[6] "u.biq.ui.tous..., *adj.* existing or being everywhere, esp. at the same time; omnipresent . . . The Random House Dictionary of the English Language 2048 (2d ed. 1987).

[7] We enter this information in a footnote because it was not part of the record before the court. A search of Internet sources returned one which states, "Quartz is the most abundant mineral in the Earth's crust. Quartz has been found in meteorites and in some

Also presented was a report of an expert retained by Smith's counsel for the hearings ordered by the Supreme Court of Pennsylvania. This expert was described by Smith's criminal defense counsel as preeminent in the field. He opined that the material was "consistent with" beach sand. This opinion was not contradicted by the FBI scientist, who also stated that the sand could have been beach sand.

From the expert testimony, all that one learns is that two grains of sand were found on Susan Reinert's feet, that a beach as source of the sand could not be ruled out, but that most of the land surface of the earth is such sand and also cannot be ruled out. One cannot conclude under these circumstances that Cape May was any more likely a source of the sand than Harrisburg or suburban Philadelphia (the location in which most of the participants in this drama resided).

If this evidence had been available to the defense at the time of trial, then, it adds virtually nothing, since the material on the lifters does not make it more likely that Susan Reinert was killed in the place in which the defense contended. If anything, the suggestion of sand, with the implication that it was beach sand in a substantial quantity and as strengthened by Guida's reaction to the suggestion, was stronger evidence than the lifters would have been.

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rocks collected on the moon." DesertUSA, *Geology: The Varieties of Quartz* (visited August 26, 1998) <http://www.desertusa.com/mag98/mar/papr/geo_quartz.htm$. It appears, then, that having these crystals on one's feet is as indicative of a trip to the moon as a trip to beach.

Smith also points to the opinion of Graci and others at the Office of the Attorney General that the lifters were *Brady* material. That opinion may be contrasted with those attorneys within the Office who believed that the lifters were not *Brady* material. Obviously, lawyers (and courts) may disagree about such matters, and the opinion of one, or more than one, attorney is not binding on a court or jury. It should be noted that this jury was presented with Graci's viewpoint.

We conclude that the verdict was not against the weight of the evidence. We also conclude that, had the question been left to the court, we would have agreed with the jury's conclusion. We state as much both because of the suggestion that the issue should have been determined by the court and to emphasize that we see no basis to overturn the jury's verdict.

IV. EVIDENCE OF FAILURE TO DISCLOSE

Smith next contends that a jury could not reasonably find that defendants Dove and Yatron did not intentionally suppress the lifters. Specifically, the jury was asked:

Did defendant Victor Dove intentionally refrain from disclosing the existence of the lifters to the prosecutor before May 1, 1986?[8]

. . . . .

---

[8] Court's note. May 1, 1986, was the day after Smith's murder trial ended and the day Dove informed Holtz about finding the lifters. The lifters were given by Holtz to Guida the next day.

> Did defendant Paul Yatron, after he learned of the existence of the lifters, intentionally refrain from disclosing the existence of the lifters to attorney Robert Graci or otherwise intentionally prevent him from learning of the existence of the lifters before July, 1988?[9]

Verdict Form at 3-4. The jury answered "No" to both of these questions.

Based on the answer to the first question, i.e. whether the lifters were *Brady* material, the answers to these questions do not affect the result, and we need not address the purported error.

V. BIFURCATION, EVIDENCE OF GUILT, AND BURDEN OF PROOF

Smith next raises a number of related issues. At trial, evidence was admitted which related to the evidence presented in the criminal trial. This evidence served several purposes. First, it placed the suppression of the lifters into context to reflect their relative importance. Second, it showed the conduct of Holtz in conducting his investigation and reflected his mental processes. The latter would be relevant for purposes of determining whether the lifters were intentionally suppressed, and whether there was malice. Finally, this evidence is relevant for purposes of determining whether

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[9] Court's note. July, 1988, was the time that Smith's defense counsel learned of the existence of the lifters.

there, was an actual injury warranting damages. *Cf. Carey v. Piphus,* 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (plaintiff entitled only to nominal damages absent showing of actual injury, due to procedural due process violation; student-plaintiffs required to show actual injury in form of suspensions that were not justified before they could recover other damages).

For the most part, Smith's argument is obviated by our conclusion that the jury properly found that the lifters were not *Brady* material. This holding precludes a finding of a due process violation or resulting injury. The only manner in which the contested evidence can have resulted in prejudicial error is if the evidence somehow "tainted" the jury's consideration of the issue of the lifters as *Brady* material.

Smith contends that we should have bifurcated the trial for these purposes. That is, the jury should have been presented with evidence concerning only the lifters as *Brady* material and their suppression. The problem with this approach is that the jury would have been considering the lifters in a vacuum, without an explanation of the criminal proceedings as a whole and the relationship of the lifters to those proceedings. This method of proceeding would have been difficult considering the context-based analysis necessary under *Brady*. Moreover, the witnesses called by both Smith and the defense would have been the same, or at least would have overlapped substantially, in both phases of a bifurcated trial. That would have required re-calling witnesses from considerable distances.

At the time that Smith's motion to bifurcate the trial (or, potentially, trifurcate for due process violation, injury, and damages phases), we ruled that such would not facilitate the orderly presentation of the case to the jury. We do not believe that the jury was unable to consider the evidence of the lifters in the context of the trial without being overwhelmed or misled by evidence suggesting Smith's guilt, particularly given our instruction that the jury was not to determine guilt or innocence of the murder. In fact, the charge emphasized that the object of these proceedings was to determine whether Smith received a fair trial and not to determine whether Smith was guilty:

> In order to prove that a defendant performed acts which operated to deprive the plaintiff of his constitutional rights, the plaintiff is not required to prove that a defendant had the specific purpose or intent of depriving him of those rights, or that a defendant acted with some particular constitutional right in mind. It is only necessary that the plaintiff prove, again by a preponderance of the evidence as to each defendant[,] that he intentionally acted in a way that did in fact operate to deprive the plaintiff of his right to a fair trial, that is, that he intentionally suppressed evidence that was material and exculpatory.
>
> . . . . . .
>
> In a case involving the kind of misconduct alleged here, the law does not require the plaintiff to prove to you that he was innocent of the murders with which he was

> charged, nor does the law require the defendants to prove to you that he was guilty. And by giving you these instructions I am not implying anything about whether the plaintiff is guilty or innocent.
>
> I further charge you that the defendants cannot assert as a defense that at the time of their actions they believed he was guilty of murder. A state official's duty to refrain from suppressing material and exculpatory evidence does not depend upon the official's state of mind or his subjective intentions. It is an objective duty which exists regardless of what the official may think.

N.T. 9/2/98, Exhibit 8 to Plaintiffs Post-Trial Motion (court's final charge to the jury).[10]

We conclude that the admission of evidence presented by the prosecution during the criminal trial and denial of the motion to bifurcate do not constitute a basis for a new trial.

VI. OTHER EVIDENTIARY RULINGS

Smith reiterates objections to various rulings on the admissibility of evidence. The first is an objection to the admission of his prior convictions as impeachment material.

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[10] The need for actual injury is discussed later in the charge.

We permitted the defense to use the convictions as such because Smith himself introduced evidence of the convictions to show that he was peculiarly vulnerable to accusations of murder. We held that defense counsel could use the convictions to impeach Smith's testimony. We fail to see error in permitting such use of evidence admitted substantively. Moreover, we fail to see unfairness in permitting the defense to use evidence which Smith introduced, while there is unfairness in using Fed. R. Evid. 609, governing the admissibility of prior convictions for impeachment purposes, as a sword rather than as the shield it was intended to be.

Smith also objected to the admission of an audiotape of a conversation between Smith and an informant, recorded without Smith's knowledge, in which Smith agreed with a suggestion by the informant that Smith's alleged co-conspirator, Bradfield, should be murdered and his body hidden. This recording fell within the general category of inculpatory evidence discussed above. Moreover, Smith was able to attack the recording as having been the fruit of the informant's prodding, one of many such recorded conversations (this being the only recording with inculpatory material) and of little value. We see no prejudicial error in its admission.

Related to Smith's arguments about the lifters is a contention that the opinion of the Supreme Court of Pennsylvania should have been admitted into evidence. The facts that the Supreme Court had found the lifters to be *Brady* material, that it had found police and prosecutorial misconduct, and that it had barred a second trial were presented to the jury.. We fail to see how the legal reasoning underpinning the Supreme Court's holdings constitutes

"evidence" for the jury's consideration. In essence, Smith's arguments amount to an attempt to present the strong language used by the Supreme Court for the purpose of coloring their view of defendants personally. Simply stated, the opinion is not evidence and did not belong in front of the jury.

VII. CONCLUSION

The question of whether the lifters were *Brady* material was a mixed question of law and fact for the jury. The jury had a reasonable basis for concluding that the lifters were not material and exculpatory evidence under *Brady*. Even if the question were solely for the court, we agree with the verdict of the jury. Smith's other claims of error do not warrant a new trial or setting aside the jury's verdict, and the post trial motion will be denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed December 14, 1998]

No. 4:CV-93-1428

JAY C. SMITH, *Plaintiff*

v.

JOHN J. HOLTZ, et al. *Defendants*

ORDER

(Judge McClure)

For the reasons stated in the accompanying memorandum, IT IS ORDERED THAT plaintiff Jay C. Smith's post-trial motion (record document no. 147) for judgment notwithstanding the verdict or for a new trial pursuant to Fed. R. Civ. P. 50, 59 is denied.

/s/_____
James F. McClure, Jr.
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed May 22, 2000]

No. 99-7046

JAY C. SMITH,
Appellant

v.

JOHN J. HOLTZ, Bureau of Technical Services, Pennsylvania State Police; RONALD F. COYLER, Bureau of Technical Services, Pennsylvania State Police; VICTOR DOVE; JOHN J. PURCELL, Special Agent in Charge, Central Regional Office, Bureau of Criminal Investigations, Office of the Attorney General; WILLIAM J. LANDER, Bureau of Criminal Investigations, Office of the Attorney General; PAUL YATRON

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge
SLOVITER, GREENBERG, SCIRICA, NYGAARD
ALITO, ROTH, McKEE, RENDELL,
and BARRY Circuit Judges

The petition for reheaing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing is here by **DENIED.**

IT IS SO ORDERED.

By the Court,

/s/_____
Hon. Theodore A. McKee
Circuit Judge

DATED: May 22, 2000

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Dated August 28, 1998]

93-CV-1428

JAY C. SMITH,	)
	)
v.	)
	)
JOHN J. HOLTZ, Bureau of Technical Services, Pennsylvania State Police; RONALD F. COYLER, Bureau of Technical Services, Pennsylvania State Police; VICTOR DOVE; JOHN J. PURCELL, Special Agent in Charge, Central Regional Office, Bureau of Criminal Investigations, Office of the Attorney General; WILLIAM J. LANDER, Bureau of Criminal Investigations, Office of the Attorney General; PAUL YATRON	)

BEFORE: Honorable James F. McClure, Jr.

District Court Testimony - Costopoulos - 8/28/98

PLACE: Williamsport, Pennsylvania

PROCEEDINGS: Jury Trial

DATE: Friday, August 28, 1998

VOLUME: Five

* * *

. . .duly sworn or affirmed according to law, testified as follows:

THE DEPUTY CLERK: Will you state your full name and spell your last name, sir?

THE WITNESS: William C. Costopoulos, C-O-S-T-O-P-O-U-L-O-S.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mr. Costopoulos, you're an attorney.

A Yes, sir.

Q And how long have you been in practice?

A I graduated from law school in 1971, and got my Masters in 1972.

Q And where do you practice law?

A I'm presently in practice in Lemoyne, Cumberland County, Pennsylvania.

Q And is there an area of the law in which you practice most extensively?

A Yes, since 1972, upon my graduation, I was a prosecutor in Harrisburg, Dauphin County, under then attorney, District Attorney Leroy Zimmerman, who ultimately became the Attorney General. And after that, approximately one year, I went into private practice in criminal defense work primarily, and I have been a criminal defense lawyer for 25 years.

Q Now, sir, I want to show you defendant's exhibit 41, which are photographs of some lifters, and I think it's fair to say that they are photographs of the lifters we have been talking about in this case.

A Correct.

Q Now, let me ask you this, did you have those lifters during the trial at any time?

A I did not have these lifters during the trial at anytime.

Q Did you hear the testimony just now of Mr. Fiedler about what he ultimately found on those lifters?

A I did.

Q Would it have been important to your defense to have those lifters at the trial?

A This evidence --

Q Answer my question first.

A Yes.

Q And why would it have been important?

A Because the defense in this case was not to rely on the weakness of the prosecution's case. We had represented to the jury in my opening argument that we were going forward with an affirmative defense, and that we were not going to simply rely on the weakness of the Commonwealth's case, which was our right.

In any criminal case, the prosecution must prove its case --

MR. NEUHAUSER: Your Honor, I am going to object and ask that the witness be instructed to answer the question.

THE COURT: Mr. Costopoulos, lawyers and professors have an inclination to be expansive when on the stand, and I know you have been associated with this case a long time, but I really do direct you to stay with the question.

THE WITNESS: Yes, Your Honor.

What was the question again, Mr. Williams?

BY MR. WILLIAMS:

Q The question is, why was -- would it have been important for you to have those lifters during your defense of Jay C. Smith, the trial of your defense?

A Because our defense was that she was murdered at the shore.

Q Well, hadn't the jury already heard that Balshy saw sand?

A That wasn't enough because that Balshy said that, the prosecution presented to the jury a scenario where he was not being truthful about what he saw and that he was being paid by the defense to say what he saw.

Q And if you'd had lifters with two particles of quartz, we'll describe it that way, at that trial, after or even during Balshy's testimony, which you -- how would you have used the lifters?

A If I would have had the lifters, Mr. Williams, at any time, I would have done exactly what I did with them when I learned that they existed.

Q Which was what?

A And that was turn it over to an individual whom I considered to be the top forensic soil analyst in the country.

Q And who was that?

A And his name was Dr. Otis Falen (phonetic), from one of the Carolinas, and that's what I did when I got them, and that's what I would have done if I got them before the trial or if I got them during the trial.

Q And did Dr. Falen give you any reports about what was on those lifters?

A He absolutely did.

MR. NEUHAUSER: I'll object at this point to the contents of the reports.

MR. WILLIAMS: Your Honor, it goes to the materiality. This has been opened up by the defense.

MR. NEUHAUSER: Well, Your Honor, it's Mr. Williams's witness. There has been no report produced. Now we are going to have hearsay from a report.

MR. WILLIAMS: May we approach, Your Honor?

(Whereupon, the following occurred at sidebar between the Court and counsel.)

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Dated August 28, 1998]

93-CV-1428

JAY C. SMITH,	)
	)
v.	)
	)
JOHN J. HOLTZ, Bureau of Technical Services, Pennsylvania State Police; RONALD F. COYLER, Bureau of Technical Services, Pennsylvania State Police; VICTOR DOVE; JOHN J. PURCELL, Special Agent in Charge, Central Regional Office, Bureau of Criminal Investigations, Office of the Attorney General; WILLIAM J. LANDER, Bureau of Criminal Investigations, Office of the Attorney General; PAUL YATRON	)

BEFORE: Honorable James F. McClure, Jr.

PLACE: Williamsport, Pennsylvania

PROCEEDINGS: Jury Trial

DATE: Monday, August 24, 1998

VOLUME: One

* * *

. . . back and forth, anything -- you never saw him do that?

A He would come in and request items or maybe look at particular items involved in the case, that's correct.

Q Now, whenever it was that you were among the group that found the tape which partially recorded Balshy's activities at the autopsy, you were there for a purpose, you were looking for something that related to Balshy's testimony. That is fair to say, right?

A Right, I think I already made that clear.

Q Right, and by the way, before we leave that tape right now, you realize, don't you, that the tape was not just Balshy at the autopsy, it was also Balshy during the processing of the Reinert vehicle?

A That's correct.

Q Because Balshy was also present at the processing of the Reinert car, correct?

A Yes. I was detailed to process the vehicle, and Balshy showed up sometime during that processing, beginning, end, halfway through, I can't really recall exactly when he showed up.

Q Now, at some point in time you found in the evidence locker at Troop H five lifters which appeared related to the Susan Reinert autopsy; that's fair to say, isn't it?

A Yes, sir.

Q Now, when do you today say that you found those lifters?

A On May 24th, 1986.

Q May 24th?

A April 24th, 1986, I'm sorry.

Q That's all right.

And you recognized today that April 24th, as you testify today, that was during the Jay C. Smith trial, correct?

A That's correct.

Q In fact, it was during the portion of the trial in which Jay C. Smith was putting on his defense, correct?

A It was after the prosecution, and the defense was in the process of presenting their case, that's correct.

Q I've heard that. Let me ask you this. Do you think that the fact that the prosecution had rested had any bearing on any duties you may have had with respect to those lifters that you found?

A Yes.

Q And what is it that you would tell this jury is the bearing that the prosecution had rested, the prosecution had rested and defense was still going on, what bearing did that have on any of your duties with respect to evidence that you found, Trooper Dove?

A I'm not quite sure. You're asking me my duties as far as --

Q Turning evidence over to the prosecutor, how about that?

A I wasn't sure. Okay.

The evidence that I had found, I assumed, or the rubber lifters that I had found, I assumed we were past that phase of the trial stage in which evidence could be introduced.

Q So you, you -- as a Pennsylvania state policeman who had testified many times, correct –

A That's correct.

Q -- in a criminal investigation, you thought that the defense could not introduce evidence in its own defense, that was your understanding in 1986?

MR. NEUHAUSER: Objection, Your Honor, argumentative.

THE COURT: Well, it's -- no, he has him as of cross examination. Overruled.

THE WITNESS: I've been at trials, believe me, where evidence was attempted to be introduced after a certain stage of the trial and we were not able to introduce it.

BY MR. WILLIAMS:

Q Well, again for now I just want to understand what you want to communicate to this jury. The fact that the prosecution had rested, do you believe that that changed your duties with respect to the evidence that you found?

A Yes, I think I made that clear.

Q I see. Now, Trooper Dove, you do agree with me that you did not turn those lifters over to the prosecutor, Richard Guida, at any time during the trial of Jay C. Smith; you agree with that, don't you?

A Did I personally?

Q Yeah, you personally.

A No, sir, I did not.

Q Well, are you aware of anybody that did turn over lifters during the trial?

A During the trial?

Q Yes, sir.

A No, sir.

Q Now, sir, I asked you before about the time when you were in the evidence locker that you found the cassette tape and you told me you had a purpose for that visit to the evidence locker, which was to look for Balshy-related evidence, correct?

A That's correct.

Q You didn't have any purpose to look for evidence on the 24th of April, did you?

A To look for evidence?

Q Yeah, to look for evidence.

A Yes, sir, I did.

Q And what was your purpose on the 24th of April?

A The trial was coming to a close, and what I was doing is cataloging all of the evidence that had remained that hadn't -- that wasn't introduced during the trial.

I was going through all the evidence to catalog that evidence, and in fact get it from the ID evidence locker into the main evidence locker where it is stored indefinitely, or in fact give it to Trooper Holtz, or in fact give it to the Attorney General's Office. There was a bit of confusion who was going to receive this.

Q And when you say cataloging the evidence, you mean making a list of the evidence that's in that evidence locker, correct?

A That's correct.

Q Where is your list, Trooper Dove?

A After I found the rubber lifters I threw the list away.

Q Oh, so --

A It was a handwritten list that I could later transpose on to property records.

Q Which you never did, correct?

A That's correct.

Q And you don't have your handwritten list, do you?

A No, sir, I do not.

Q And you don't have any evidence other than your word as to any purpose for going into that evidence locker on April 24th, which was a week before the trial ended, do you, other than your word?

A Other – I'm not sure I understand that. You're asking me that because I was going through it on the 24th, I had no legitimate reason to go through it before the end of the trial?

Q I am saying, you don't have any evidence of fulfilling the purpose you said you had other than your word, that's all I am saying right now. You don't have any -- you don't have a report, and you don't have any notes.

A Can I prove that I was going through it on the 24th? If that is your question, no, I probably cannot.

Q But my question right now is, can you give us evidence of the purpose for being there on the 24th?

A I think I already made that clear, I was going through the evidence, the trial was winding down, so that I could make a detailed list of what was remaining that wasn't introduced during the trial, to get it out of my evidence locker into the main evidence locker. Some of those items had been in my possession -- well, not in my possession, but in the ID evidence locker for a period of six years. I wanted to get rid of it.

Q Now, is your testimony that you did not find those lifters at the same time you found the cassette?

A No, I didn't find the lifters the same time we found the cassette, that's correct.

Q I see.

Now, Mr. Dove, when you found these lifters, you had some concerns, didn't you?

A Yes, sir.

Q Among your concerns was a concern that another trooper by the name of Ronald Colyer would get in trouble if you turned over the lifters, right?

A No, sir.

Q Weren't you concerned that turning over the lifters might reflect badly on Colyer's testimony?

A On his testimony at the trial, that's correct.

Q Because Ronald Colyer had been called by the prosecution to testify that he couldn't remember Balshy using anything around the lifters -- around the feet of Susan Reinert; he couldn't recall that, right?

A Correct, Balshy – I'm sorry, Colyer testified to that as well as other members, that's correct.

Q And so you were concerned that if you now found lifters and you turned them over that might make Colyer look bad, right?

A Make him look like a perjurer.

Q Right, and so -- and that was of concern to you, right?

A That's correct.

Q Because Ronald Colyer was not only your colleague, he was a friend, right?

A That's correct.

Q And so quite naturally you went to Ronald Colyer and told him that you had found lifters, didn't you?

A Yes, sir.

Q And what did Ronald Colyer tell you what to do with the lifters, Trooper Dove?

A He took a courtesy look at them and said, well, look if these things are real and they exist, you should turn them in.

Q And did you turn them in when Ronald Colyer told you to turn them in?

A I turned them in on May 1st, that's correct.

Q That's not my question. My question is, you said you turned them in on May 1st, which is a week after you say you found them, today.

A That's correct.

Q And the day after the trial was over, correct?

A That's correct.

Q And how long before you turned them over had you gone to Ronald Colyer?

A I worked 4 to 12 on the -- on April -- April 24th, and the next day I worked 8 to 4. Ron Colyer worked 8 to 4 also, and I talked to him on Friday during that 8 to 4 period.

Q Right, which would be April 25th, right?

A Yes, sir, that's correct.

Q So now here is Trooper Colyer that you're concerned about, boy if I turn these lifters over, he's going to look like a perjurer. You show him lifters on April 25th, and he says, hey, turn them over, right?

A That's correct.

Q And now you want the jury to believe that you didn't turn them over to Trooper Holtz for a week later -- until a week later?

A That correct, there were also other members that testified that they didn't exist too.

Q Like who?

A Dr. Bear, Tom Dacheux, Jack Holtz, there were four or five members that testified they didn't exist.

Q Um-hum, and what, you were concerned that their testimony might appear wrong if you turned the lifters over?

A Certainly, that's correct.

Q And that's why you sat on them.

A That's -- well, that is one reason, yes.

Q Now, what other reasons were there, Trooper Dove?

A I didn't feel that they were any evidence. They weren't logged in or cataloged. They had no chain of custody to them. They weren't properly marked and had any origin.

Q Really. Well you gave them -- you eventually gave them to Trooper Holtz, didn't you?

A Yes, sir.

Q Where is your receipt from Trooper Holtz, Trooper Dove?

A I gave them to Holtz without a receipt.

Q Right, and you gave them to him at his house, didn't you?

A That's correct.

Q At night.

A Well, in -- May 1st, I had gone 10-7, I had gone out of service at his residence, and then I probably went from there to eat dinner at my residence. I don't think it was dark time. It was a 4 to 12 shift, but probably 6 o'clock.

Q Can we agree on evening?

A Evening, but not during the hours of darkness.

Q Okay. After your shift, after work you gave it to Holtz at his house.

A No, no, no. It was 4 to 12 I worked, 4 to 12 on the Thursday I found them. On the May 1st, I was also working 4 to 12.

Q Now, between when you found the lifters and when you gave them to Trooper Holtz, as you are describing it now -well, where was Trooper Holtz?

A I'm not sure.

Q Well, you knew he was involved in the Reinert case, didn't you?

A During the business hours, I assumed he was at the -- at trial, that's correct.

Q And did you ever go to the courthouse to give him the lifters?

A No, sir, I did not.

Q Did you think he was unavailable to receive this evidence from you?

A I'm not sure if he was or not. I tried to call him over the weekend at his residence, however, I couldn't get a hold of him, couldn't get an answer from him.

THE COURT: Mr. Williams, any time you find is a good point to stop we'll take a luncheon break because I don't want to interrupt your flow.

MR. WILLIAMS: That's fine, Your Honor, and I think this is a good time.

THE COURT: We'll take a luncheon recess, members of the jury, for an hour and a quarter. We will start at ten of two, and keep an open mind and don't discuss the case. You may step down.

THE DEPUTY CLERK: We're in recess; please rise.

(Whereupon, a luncheon recess was taken from 12:36 p.m. to 1:52 p.m.)

(Jury not present.)

* * *

. . . Holtz right away.

That's what you said in August of 1988; isn't it, sir?

A That's a statement, of course this is not a signed statement, but that's what I said, yes, to the best of my recollection.

Q Okay, and you said that during -- let me ask you this. Did you assume that the BPR investigation was going to be confidential?

A Did I assume it was going to be confidential?

Q Yes.

A I'm not sure I knew that or not. I was under the impression at one time it was confidential; however, I was also told that those items could be turned over to anyone under discovery. I was a little confused whether there was confidentiality involved in it or not.

Q All right, sir.

Now, when you told Clancy, "When I found the lifters I called Trooper Holtz right away," you told him why you called Holtz right away, didn't you? You said, "I was shook up. Was I that stupid I didn't see the lifters all those years?"

A That's in quotes, that's correct.

Q You said -- did you say this? "I thought they were planted there. I was confused. I didn't know if I should just leave them there or tell Trooper Holtz. I knew I found a hot potato."

Did you say that?

A No, I never said hot potato, and I believe I alluded to that before. I never used the word hot potato. Someone obviously misunderstood. I said I had a hot item.

Q A hot item not a hot potato.

A Correct.

Q You knew the lifters were a hot item, right?

A That's correct, in the eyes of the Balshy investigation, that's correct.

Q And also in the eyes of the prosecutor of Jay C. Smith, who was the guy that wanted Balshy prosecuted for perjury, right?

A They were an item at issue, that's correct.

Q That's right. And in fact, the BPR investigators later in September of 1988 gave you a chance to revise your statement and correct anything that you wanted to correct; isn't that correct?

A That's correct.

Q And let me refer you to plaintiff's exhibit 54, which I think is in that book, sir. Just tell me when you've had a chance to review it, sir.

A Your question is, sir?

Q Well, well first of all, my question is, is that a . . .

* * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed June 26, 1998]

4:CV-93-1428

JAY C. SMITH,	)
Plaintiff	)
	)
v.	)
	)
JOHN J. HOLTZ, et al.	)
Defendants.	)
	)

JURY TRIAL DEMANDED

HON. JAMES F. McCLURE

PLAINTIFF'S PRETRIAL MEMORANDUM

Counsel conferred on June 22, 1998, in accordance with Local Rule 16.3.

A. JURISDICTION

Federal jurisdiction exists, as this is an action for damages under 42 U.S.C. § 1983.

B. PLAINTIFF'S STATEMENT OF FACTS AND LIABILITY

On April 30, 1986, after a trial in the Court of Common Pleas of Dauphin County, Pennsylvania, plaintiff was convicted of the murders of Susan Reinert and her two children. Thereafter, he was sentenced to death. Plaintiff remained imprisoned, on "death row," for more than six years. On September 18, 1992, the Supreme court of Pennsylvania ordered the discharge of plaintiff, and invalidated all charges against him, finding that he had been the victim of official misconduct intended to deny him a fair trial, and to secure his conviction through the deliberate concealment of . . .

* * *

1986, Purcell and Yatron came into possession of the lifters in the course of their "perjury investigation" of John Balshy, the former State Trooper who had testified that the exculpatory lifters had been used to remove sand from the victim's feet.

C. STATEMENT OF UNDISPUTED FACTS

1. All defendants acted pursuant to or under color of state law at the times alleged in the complaint.

2. Plaintiff was convicted of three murders on April 30, 1986, and sentenced to death.

3. Plaintiff remained imprisoned until his discharge was ordered by the Supreme Court of Pennsylvania on September 18, 1992.

4. The Supreme Court's opinion ordering the discharge is found in Commonwealth v. Smith, ___ Pa. ___, 615 A.2d 321 (1992).

5. From approximately October, 1981, through April 1986, defendant Holtz was the principal state police investigator assigned to the homicide case in which plaintiff was arrested and tried.

6. The evidentiary phase of plaintiff's murder trial began on April 7, 1986.

7. On April 8, 1986, John Balshy, a former state policeman, testified that, at Susan Reinert's 1979 autopsy, he used adhesive "lifters" to remove some sand he had observed on or around Reinert's feet.

8. On April 11, 1986, Richard Guida, who stated that he had not heard of the lifters before Balshy's testimony, made a written request that the Attorney General's office investigate perjury charges against Balshy.

9. Sometime before the end of plaintiff's trial, Victor Dove had in his possession lifters labeled with the date of Susan Reinert's autopsy and references to her feet, but did not disclose that fact to Guida or plaintiff's defense counsel.

10. On May 2, 1986, Purcell received from Holtz the lifters which Dove had possessed.

11. Sometime in 1986, Yatron was assigned to the Balsby perjury investigation, and became aware of the lifters' existence.

12. In January, 1987, the FBI laboratory confirmed in writing to the Attorney General's Office, including Yatron, that two of the lifters held particles of "quartz."

13. On July 11, 1988, Deputy Attorney General Robert Graci disclosed the existence of the lifters to plaintiff's defense counsel.

14. During 1986, defendant Holtz received payments from author Joseph Wambaugh totaling $50,000.00.

15. In April 1986, Holtz met with Wambaugh once in Holtz's home, and once in Wambaugh's hotel room in Harrisburg, Pa.

16. At the time of these meetings, Holtz had in his possession a January 29, 1981 letter Wambaugh had written to Sergeant Joseph VanNort of the Pennsylvania State Police (Pl. Ex.

* * *

CERTIFICATE OF SERVICE

I, GERALD J. WILLIAMS, hereby certify that on this date I served a true and correct copy of the foregoing Plaintiff's Pretrial Memorandum addressed to Defendants by U.S. first class mail, postage prepaid upon the following counsel and parties of record:

Gregory R. Neuhauser
Senior Deputy Attorney General
Commonwealth of Pennsylvania
Office of the Attorney General
Litigation Section
Strawberry Square, 15th Floor
Harrisburg, Pennsylvania 17120

/s/_____
Gerald J. Williams

Dated: June 24, 1998

APPENDIX I

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

NOS. 1677, 1677(a), 1677(b)
CRIMINAL DIVISION 1985

COMMONWEALTH OF PENNSYLVANIA	)
	)
VS	)
	)
JAY C. SMITH	)
	)

VOLUME 22

BEFORE: HONORABLE WILLIAM W. LIPSITT

DATE: TUESDAY, APRIL 29, 1986

PLACE: COURTROOM NO. 1
DAUPHIN COUNTY COURTHOUSE
HARRISBURG, PENNSYLVANIA

COUNSEL PRESENT:

RICHARD L. GUIDA, ESQUIRE
KATE DREHER, ESQUIRE

FOR - COMMONWEALTH

WILLIAM C. COSTOPOULOS, ESQUIRE
CHARLES RECTOR, ESQUIRE

FOR - DEFENDANT

* * *

. . . any brown-haired person in the world, and he demonstrated it for you graphically with slides, and the fiber, the same conclusion. They don't even know if they are polyester, and that's their case.

The comb was clean. The pin that was clean. The fibers and the hair mean nothing, and the statements of William Sidney Bradfield.

Ladies and gentlemen, you have the power to render the only appropriate verdict in this case based on the evidence we've all heard, and that is Jay Smith is not guilty. It's in your hands. Thank you.

THE COURT: Thank you, Mr. Costopoulos. Ladies and gentlemen, as you can observe the time, and we anticipated that there would be some scheduling difficulties today. What we are going to do now is have a recess. You

are going to have an early lunch, and Mr. Guida will give his closing address at 1:00.

With that, will you call the recess, and we will ask you to return at 1:00.

(Whereupon, at 11:25 a.m., the lunch break was taken.)

AFTERNOON SESSION

THE COURT: Good afternoon, ladies and gentlemen. All right.

MR. GUIDA: Thank you, Your Honor. Ladies and gentlemen, seven years ago, approximately seven years ago, on a very cold summer morning, Trooper John Holtz was awakened at approximately six a.m., left his bed and went to the Host Inn parking lot. Since that time, the most massive police effort in the history of Pennsylvania has been continuing to try to solve the Reinert murder case.

Four and a half years ago, I joined the Office of Attorney General. My first assignment was this matter. Today, it's over. Today, all of the effort expended by the prosecution by the defense, by the FBI, it all comes down to you. You are the final arbiters of the facts. You in a very real sense are the criminal justice system. Because the police can do their job, the prosecutors can do their job, the defense can do its job, but without you, without jurors who are willing to come in here and sit and listen to the facts and be objective, we don't have a system.

It is all up to you. Every bit of this case. In my opening argument, I pointed to you to the crowd in the back, and I pointed to the reporters here, and I said to you that that should not be a distraction. I have watched you through this case, and I believe that you have not been distracted, and I ask you one more time to put a wall up right there in front of that rail and to put a wall up right there and concentrate on what's happening here in the well of the Court because that's what's important.

You paid attention. You got about two hours more to pay attention to me, and then we're going to give it to you. As you sit there as jurors, I am sure you think, well, what makes this special? Why am I here? I'm not a policeman. I'm not a lawyer. I'm not a Judge. I know very little about the legal system. Why am I sitting here?

You are sitting here for one good reason, and that is because you all have good common sense, and common sense is the tool that you will use when you leave this room to make a decision on whether the Defendant is innocent or whether he is guilty. That is the only tool you need. To perform a work function, it is necessary not only to have a tool, but you must have a blueprint or a plan that will come from the Court. Judge Lipsitt will tell you the law, and you must obey the law in this situation, and the materials you will work with are the materials that we have spent four weeks assembling here in this courtroom for you to listen to. Those are your materials.

It is your job to take those materials, the words that came from the witness stand, the exhibits that you see in this matter. You take those and you reach a decision applying your good common sense.

In this case, the law is not complex. Mr. Costopoulos said in his opening argument, I agree with him, this is a case of murder in the first degree or it is nothing. You will be charged on other degrees of murder; murder in the second degree, murder in the third degree, but in this case, the Commonwealth is alleging that this Defendant cold bloodedly and brutally killed a woman and her two small children.

Why? We'll talk about motive in awhile. Money and fear. Those motives coupled with that pack spell one thing, murder in the first degree. So, the law with regard to what you have to look at in terms of the crimes that are accused is very simple. Murder is a simple concept. Premeditation is a simple concept. Hardness of heart is a simple concept. Brutality is a simple concept. All of those coalesce. So you are just going to decide, I submit to you, although you have other options other than guilty or not guilty.

The two questions of law which you may -- you certainly will be listening to and which have an affect on this trial are, number one, the burden of proof, and, number two, the definition of evidence and how evidence is applied in a case such as this.

The Commonwealth has the burden of proving the Defendant guilty beyond a reasonable doubt. We accept that burden. If you were to imagine a scale of justice with the arms outstretched, the Defendant starts with a counterweight. He starts with a weight on his side of the scale which is called the presumption of innocence, and it is the Commonwealth's obligation to tip the scales, make the weight become stable, and then move to the other side. That is basically the burden the Commonwealth has.

Now, the defense has an opportunity to place other weights on that side of the scale, but basically we are talking about the counterweight, the presumption of innocence and anything that the defense wishes to put on.

Proof beyond a reasonable doubt was defined by the defense, and the definition is correct. It is a doubt which would cause you as a person to refrain from acting in an importance to yourself. That's the depth. It's not a doubt -- the Commonwealth is not required to prove to you the Defendant is guilty to a mathematical certainty, nor is it required to prove the doubt in this case to all doubt. In other words, I don't have to eliminate all doubt from your mind. All I have to do is make sure that you don't have a reasonable doubt. A reasonable doubt, and once that weight is carried, and the verdict is mandated. The verdict is guilty.

If the Commonwealth were required to prove to you the guilt of the Defendant to a certainty, if they were required to remove all doubts from your mind, then we would never assemble in courtrooms because unless we had somebody there with a camera, and unless the Defendant left his fingerprints, and unless we had 20 eye witnesses, and the gun, and ballistics and everything else, we couldn't prove a crime. We couldn't. The system would fail. Absolutely fail, and obviously, when you have a Defendant, well educated man who we allege conspired with another well educated man for a period of months to accomplish the murder of Susan Reinert, we are not going to have the prints. We are not going to have the gun. Nor are we going to have the bodies of Karen and Mike Reinert.

Because in the melee of what happened on that night, Karen and Mike Reinert were witnesses. They weren't worth the money, but there were two people involved. At the very least, two people involved, and that's what we are talking about today.

In this case, the Commonwealth has presented two types of evidence; direct and circumstantial. Direct evidence is someone who would come into the courtroom and say the Defendant confessed to me. He told me he did it or someone who comes in and says I saw the Defendant do it. I saw him on the night of the crime. I saw him kill Susan Reinert. I saw her two children brutally slain.

In this case, we have a man by the name of Raymond Martray who says that. Who says that Jay Smith told him I did it. I killed the bitch. I took care of them. That's direct evidence.

The rest of the Commonwealth's case is what is called circumstantial evidence. Circumstantial evidence is a group of facts, none of which in and of themselves are sufficient to prove the Defendant's guilt, but to create a mountain of pebbles of evidence. A mountain of coincidences that cannot be explained away, and sometimes and in many cases circumstantial evidence points has far greater weight than direct evidence, and the Court will instruct you that you could convict this Defendant on circumstantial evidence alone.

As I said to you in my opening statement, circumstantial evidence is viewed by the public in a rather skewed way. Many times you will hear people talk about

circumstantial evidence, and they'll say, oh, it's only circumstantial evidence.

Let me give you an example of circumstantial evidence. Let me give you an example of how sure you can be if you see circumstantial evidence. The Court may, in fact, use this example. You are here in this building today, and when you came in, the sun was out. It was a nice day, 75 degrees. Now, you've been inside the whole day. Assume that. You leave the courthouse this evening, and you walk outside. The streets are covered with water. All of the cars have water on them, and people are carrying umbrellas, but they are folded. It's not raining.

Now, what do you think happened while you were in the courthouse? Could you reach any other conclusion than that it had rained? You didn't see it rain. No one told you it rained, but would you be sure? And those are circumstances. Water on the streets. Umbrellas closed in people's hand, and water on the cars, and that's what we're talking about in this case to a large extent.

The defense in this case has reminded me of another example of circumstantial evidence. Imagine if you will 20 or 30 years ago in midwestern farming community, and the housewife in the community, or the housewife at home bakes some pies. Some blueberry pies, and her son is there, and his pet dog, and she bakes the pies, and as was the custom then, she sits the pies on the windowsill to cool. She leaves the kitchen. She goes upstairs.

Half an hour later she comes down. The pie is gone, and her little boy is standing there covered with blueberries.

His mother looks at him and says, Johnnie, what happened to the pie, and Johnnie looks at her and says the dog ate it.

The defense in this case reminds me very much of that example because what the defense has told you in their closing argument is that everybody, almost everybody that appeared in this case, John Holtz, the FBI, Mary Gove, Beth Ann Brook, myself, the people who went to the shore, Wendy Ziegler, everybody committed a crime except one person, that man, the Defendant. The man accused of murder. That was basically the defense. Everybody else lied. The police perjured themselves. I placed perjured testimony knowingly before you. The FBI lied about scientific tests. Everybody committed a crime, everybody, except him. He's the only one that stood in this courtroom pristined before you and did not commit a crime.

What did the defense say to you. Let's wrap up the defense case. Mr. Costopoulos reminded you that during the first or second day of the Commonwealth's case Trooper John Balshey retired, took the witness stand, and why did he take the witness stand? Well, we called him to do one very specific thing. We wanted to chain evidence, and to show you that he had tried or attempted to take a lift of a print off of Susan Reinert's body which turned out to be consistent with the Coroner's prints.

He was called for those two specific purposes. At the time that he took this witness stand, he was not a state policeman. He was retired, and who was he working for? He was working for the Defendant's private investigator. What had tempted Mr. Balshey, I submit to you, was a note, a note

explained on the first day of this trial which said what. Said something about Cape May and instructions.

You later learned that that was in the handwriting of Susan Reinert. It was directions to her friend's house, Fred Wattenmaker's, and she had visited there in Easter, but on the first day of the trial, the defense seized on that. They saw a way to create reasonable doubt. They saw a way to pin the murder on somebody else, and so what did they need? They didn't know at that time Susan Reinert had written that note. They didn't know at that time that it was really directions to Fred Wattenmaker's place, and so, John Balshey called by the Commonwealth to take two -- to make two specific statements and only that, a man who is now working for the defense private investigator, what does he say?

Gets on the stand. He answers my questions. On cross examination, suddenly he moves to the legs, the feet. I object. The Court allows it. Mr. Costopoulos said it was like pulling teeth. It was more like pulling out dentures. He couldn't wait, and what did he say? What did he say? He said I examined her feet, and I saw gritty particles. Could have been sand. A big smile came over his face, a big smile.

What did you find out the next day? What did you find out about Trooper Balshey, ex-trooper Balshey? You found out that the evidence collection procedures at an autopsy require everyone who is there who finds evidence must first contact the evidence officer, in this case Trooper Dacheaux. They must attempt to have the item photographed in place, and then they must collect the evidence and give it directly to Trooper Dacheaux, and what did Trooper Dacheaux tell you? I never heard of this before in my life. I wasn't asked to take

a picture. Balshey never sent it to me. I never got a rubber lifter. I don't know what he's talking about.

What happened after that? We weren't done. We brought in the man who was working with Trooper Balshey. The man who was down there examining the body. What did he say? I never heard anything about this. Where's the rubber lifter? Trooper John Holtz took the witness stand. He was there. He saw Mrs. Reinert's body laying on that slab, and what did he say? He was impressed by how clean her feet were. Didn't see anything at all, and then an FBI agent and Trooper Holtz tell you about a meeting very early on in this investigation when the police were exploring the possibility that Mrs. Reinert might have been at the shore. Exploring that, actively looking at that as part of their investigation, and they called John Balshey down to this meeting, and in front of an array of Pennsylvania State Policemen and FBI agents, he's asked to review the autopsy with them with the specific reason to determine whether Mrs. Reinert may have been at the shore, and what does John Balshey say? Nothing.

The man who works for the defense team's private investigator. What do you think? What do you think he did? I submit to you that he told you something that was untrue. Never before in an investigation had he heard anything about this, and then he slips it out in the final moment of his testimony. It's a sad commentary. A very sad commentary on what was a decent career with the state police.

But the search for the dollar after you leave your police service does not include nor does it allow you to commit perjury. What did his testimony have? What value did his testimony have for the defense? What went on their side

of the scale? Zero. Nothing. As a matter of fact, it might tell you something else.

Agent Ritter from the Federal Bureau of Investigation was called in, and they were going to take Grace Gilmore apart. They were going to show you that Grace Gilmore had made a statement that was inconsistent with what she said. What she said was I left for the shore Saturday. I came back Sunday. I heard someone downstairs. I saw Smith's car leave.

What did Agent Ritter tell you? Agent Ritter said Mrs. Gilmore told me she was there one day of the weekend. She heard Smith downstairs, and she heard him. Sunday is a day of the weekend. Value? Zero. Nothing except that counter-weight.

The FBI was called to testify about Mary Gove. They were going to show you that Mary Gove, and you saw her. Mary Gove, of course, lied to you. That's what they are suggesting. And what did the FBI say? Well, the FBI said Mrs. Gove heard the car door slam. She didn't see them get in the car. She didn't say she didn't see them drive away. She just said she didn't see them get in the car, and while testifying here in this courtroom, what did she say? She said I might have said that one other time, but I'm sure of what I saw.

What else did we bring you? Beth Ann Brook, her granddaughter. What did Beth Ann tell you? Beth Ann said

* * *

APPENDIX J

MEMORANDUM - GUIDA TO KEUCH DATED APRIL 11, 1986

Subject: Possible Perjury - Former Corporal John Balshy (PSP)

To: Robert L. Keuch, EDAG, Director, Criminal Law Division

From: Richard L. Guida, CDAG, Chief, Prosecutions Section

On April 8, 1986, I called to the witness stand in the Jay Smith murder trial former Corporal John Balshy, Pennsylvania State Police. Ex-Corporal Balshy is now a private investigator and is employed by the private investigating firm which is assisting the defense in this matter. Mr. Balshy was called by the Commonwealth for the specific purpose of confirming an attempted lift of a fingerprint from the body of Susan Reinert and to chain blood samples from the PSP Lab to the toxicologist who analyzed the blood and found morphine in Mrs. Reinert's system.

On cross-examination, Mr. Balshy was asked a number of questions outside the scope of direct examination. I objected, but Judge Lipsitt allowed the questioning. With obvious knowledge, defense attorney William Costopoulos asked Corporal Balshy if he had found any debris on the feet or between the toes of Mrs. Reinert. Balshy immediately volunteered that he had observed some type of granular

substance between her toes and had lifted the material with a rubber lifter at the autopsy. It is obvious from Costopoulos' tactics thus far that he will attempt to establish that Mrs. Reinert was killed at the shore in Cap May, New Jersey by William Bradfield, Chris Pappas, and Susan Myers. The sand, therefore, is extremely material to the defense case.

There are no State Police reports to confirm Mr. Balshy's observations, nor are there any indications from any police officers that this material was ever seen or found. On re-direct, I questioned Mr. Balshy and asked him if he had ever reported this matter to anyone; he responded in the negative. I also asked him where the rubber lift of the sand/granule particles was located; he responded that he did not know.

On April 9, 1986, I called three witnesses, one of whom was Corporal Thomas Dacheux, who was the evidence collection officer at the autopsy. Corporal Dacheux indicated that State Police procedure in all cases is that material located on the body of the deceased is first brought to the attention of the Identification Officer for photographing, if possible. After photographing is completed, the material is then collected and immediately turned over to the evidence officer. Dacheux indicated that Balshy had never indicated to him that there were any particles on the feet of Susan Reinert, and he had never received any rubber lifter or any item containing alleged granules.

Corporal John Collier of the Pennsylvania State Police also testified that he had assisted Corporal Balshy in the examination of the body and was present throughout the entire procedure. He indicated that, to the best of his knowledge, Balshy did not find any granules between the toes, and, to the

best of his knowledge, Balshy did not collect any material from the feet.

Trooper John Holtz of the Pennsylvania State Police also attended the autopsy and confirmed that no material was found. He also indicated that he directly observed the feet of Susan Reinert and was surprised at how clean those feet were.

Special Agent Donald Redden of the FBI testified on April 10, 1986 and indicated that he had attended a briefing meeting with Corporal Balshy in 1980 where Balshy was directed to produce all items and brief all investigators on all those items which were collected at the autopsy. At that time, a possible focus of the investigation was the Cape May area, and there was some belief among the investigators that that possibility should not be ruled out. Balshy was aware of this, but, in briefing all present at the meeting, he never mentioned any granular substance which he observed or found on the feet of Susan Reinert.

Dr. Robert Bear, our pathologist, testified that he examined the area between the toes of Susan Reinert for injection sites and found none. Dr. Bear also did not observe any substance between the toes.

There is also a tape recording of the autopsy, which indicated nothing to substantiate Balshy's finding any granular substances on Mrs. Reinert's feet.

On April 10, 1986, I spoke with the District Attorney of Dauphin County, Richard Lewis, and informed Rich of the circumstances of this matter and asked if he would be willing to initiate a perjury investigation. Since it is our case, and

since the State Police are heavily involved, I believe it would be inappropriate for us to conduct such an investigation. Rich also expressed concern over the testimony and informed me that a police department in northern New Jersey had previously contacted him concerning John Balshy and had indicated that he had offered an opinion in a homicide case that a fingerprint, which had previously been identified by the prosecution and the defense experts, was not, in fact, the print of the defendant.

Rich indicated to me that he would like a letter from the Office of Attorney General, requesting that he initiate the investigation but requesting that that investigation not occur until after completion of the Smith trial. I believe our referral to the District Attorney's Office should be received by them prior to the conclusion of this trial, so that, in the event of an acquittal, there is no appearance of "sour grapes". It is clear to me that John Balshy perjured himself and, perhaps, has done so in the past. I consider this a priority matter, and I would ask that you bring it to the attention of the Attorney General for a decision.

If there is any thought of our not requesting such an investigation I would like an opportunity to place my position personally before the Attorney General, in that I believe this is an extremely serious matter.

RLG:ajp

APPENDIX K

SUPREME COURT OF PENNSYLVANIA

[Filed September 18, 1992]

COMMONWEALTH OF PENNSYLVANIA *Appellee*,	)
v.	)
JAY C. SMITH *Appellant*.	)

William C. Costopoulos, Lemoyne, for appellant.

Robert A. Graci, Chief Deputy Atty. Gen. and Anthony Sarcione, Executive Deputy Atty. Gen., for appellee.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and CAPPY, JJ.

OPINION OF THE COURT

FLAHERTY, Justice.

In this infamous murder case, we are compelled to order the discharge of appellant Jay C. Smith. Despite our prior holding granting a retrial, *Commonwealth v. Smith*, 523 Pa. 577, 568 A.2d 600 (1989), we now hold that the prosecutorial misconduct during appellant's first trial was not only impermissible, but had constitutional implications under the double jeopardy clause which prohibit retrial.

At issue is whether the double jeopardy clause bars retrial following intentional prosecutorial misconduct designed to secure a conviction through the concealment of exculpatory evidence; previously, we have held that "double jeopardy will attach only to those mistrials which have been intentionally caused by prosecutorial misconduct." *Commonwealth v. Simons,* 514 Pa. 10, 16, 522 A.2d 537, 540 (1987), adopting the federal constitutional standard set forth in *Oregon v. Kennedy,* 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). The Superior Court recognized that our prior remand did not foreclose this question, and it considered the issue and the claim of double jeopardy to be outside the scope of the direct appeal. *Commonwealth v. Smith,* 404 Pa.Super. 553, 557, 591 A.2d 730, 732 (1991). Superior Court's view is supported by the fact that the after-discovered evidence of prosecutorial misconduct during appellant's trial was unknown to appellant during his direct appeal and was not presented to this court at that time. Both the trial court and the Superior Court, *Commonwealth v. Smith, supra* at 559, 591 A.2d at 733, in proceedings following remand, found that intentional prosecutorial misconduct had been proved by appellant but deferred the remedy, a question of first impression, to this court. We granted allocatur to consider this question.

Inasmuch as a more detailed description of the crimes charged against appellant is contained in our prior opinion, *Smith, supra,* 523 Pa. 577, 568 A.2d 600, we abridge our description of the case for purposes of this appeal. Schoolteacher Susan Reinert and her two young children were murdered in June, 1979. William Bradfield, who was her fiancé and fellow schoolteacher, and appellant, who was the principal of their school, allegedly had conspired to murder Mrs. Reinert in order to recover the proceeds of insurance policies on her life which named her fiancé as beneficiary. The Commonwealth presented physical evidence linking appellant to the murders as well as various other testimonial evidence which, together, this court regarded as sufficient to sustain appellant's conviction. *Id.* at 586, 568 A.2d at 605. Nevertheless, this court held that appellant was entitled to a new trial due to the admission of impermissible hearsay testimony by associates of alleged co-conspirator Bradfield. *Id.* at 588-96, 568 A.2d at 605-09.

Before appellant could be retried, he filed a motion to preclude a new trial based on double jeopardy because of after-discovered evidence of prosecutorial misconduct. He alleged that the Commonwealth withheld potentially exculpatory physical evidence during his first trial and that the Commonwealth knowingly denied the existence of the agreement which existed with its chief witness whereby the witness received favorable sentencing treatment in exchange for his testimony against appellant. These alleged Commonwealth tactics were clearly in violation of the rule of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed.2d 215 (1963), and, if proved, would, at the very least, entitle appellant to a new trial pursuant to *Brady.* Under the holding of *Commonwealth v. Simons, supra,* however, appellant

would not be entitled to discharge to avoid double jeopardy, for the violation was not based on a "claim that the prosecutor *intended to provoke a mistrial." Id.* 514 Pa. at 20, 522 A.2d at 542 (emphasis in original). Appellant presents the case hypothesized in *Simons*, "where the Commonwealth conceals its efforts to subvert the truth-determining process, . . . [where there is] no intent to goad the defendant into moving for a mistrial. Quite the opposite, the intent would be that the defendant should never know how his wrongful conviction came about." *Simons, supra* at 23, 522 A.2d at 544 (Flaherty, J., concurring).

After appellant's direct appeal from his first trial, he acquired evidence that the Commonwealth had obtained his conviction by overreaching in two respects. Specifically, he learned that the prosecution's chief witness, Mr. Martray, who denied the existence of any bargain in exchange for his testimony against appellant, was in fact awaiting sentencing for unrelated crimes and did in fact receive favorable treatment by the Commonwealth at his sentencing. Appellant was thereby precluded from impeaching Mr. Martray's veracity by exposing his motivation to testify falsely against appellant in order to minimize his own punishment. Secondly, appellant learned that the Commonwealth knowingly withheld physical evidence by hiding the fact that grains of sand were discovered between the toes of the murder victim at her autopsy, failing to present this evidence at appellant's trial and failing to apprise appellant of the evidence in compliance with *Brady, supra*. The significance of the sand lay in the fact that the scene of Susan Reinert's murder was unresolved; it was possible that the murder did not take place where the body was discovered but somewhere else and that the body was afterwards moved to the place of

discovery. The prosecution theory was that the murder took place in Pennsylvania, whereas the defense theory was that the murder occurred in Cape May, New Jersey, where Bradfield had been and appellant had not. Thus the existence of the sand was potentially exculpatory to appellant, and the Commonwealth deliberately concealed the evidence for more than two years after the trial.

Due to the fact that appellant learned of these incidents of misconduct long after his trial, they were not part of the record at the time of his direct appeal. Upon remand to the trial court, appellant moved for discharge on the basis of the after-discovered evidence. Hearings were held, and the trial court found as fact that both incidents of misconduct were committed by the Commonwealth. The adhesive "lifters" used to remove and retain the sand from between the victim's toes were discovered by the Commonwealth during appellant's trial but were not disclosed to appellant despite the prosecutor's awareness of their importance. This is established by a mid-trial memorandum from the assistant attorney general who prosecuted appellant to his superior, the executive deputy attorney general, stating: "It is obvious from [defense counsel's] tactics thus far that he will attempt to establish that Mrs. Reinert was killed at the shore in Cape May, New Jersey by William Bradfield, Chris Pappas, and Susan Myers. The sand, therefore, is extremely material to the defense case." Similarly, the Commonwealth deliberately denied the existence of the agreement pursuant to which its witness, Mr. Martray, received extremely lenient treatment at his sentencing in return for his testimony against appellant.

Such misconduct, standing alone, would suffice to implicate the protection of the double jeopardy clause. But

further examination of the record establishes the bad faith of the prosecution beyond any possibility of doubt; indeed, it would be hard to imagine more egregious prosecutorial tactics.

One of the Commonwealth's witnesses was Corporal John Balshy, a former Pennsylvania state trooper who had investigated the Reinert murders and been present during the victim's autopsy. He testified on cross-examination that he had used adhesive lifters to remove granular particles which looked like sand from between the victim's toes. The Commonwealth excoriated Corporal Balshy, implying that he had fabricated his testimony about the adhesive lifters. The Commonwealth then presented the testimony of other state police officers who had attended the autopsy and did not remember the sand or the adhesive lifters, attempting to prove that Balshy's testimony was false. The prosecutor even recommended to the deputy executive attorney general that he investigate the feasibility of prosecuting Balshy for perjury. A few days later, *while appellant's trial was still in progress,* the Pennsylvania state police discovered the missing adhesive lifters in their evidence locker at the state police barracks. Despite their significant relation to the facts at issue in the trial, the Commonwealth suppressed the discovery. Then for more than two years, while appellant's case was on direct appeal to this court, the Commonwealth continued to suppress the fact that it had in its possession the disputed exculpatory evidence, vigorously arguing all the while that this court should affirm appellant's death sentence.

Meanwhile, Corporal Balshy was made the scapegoat for the misconduct on the theory that he had fabricated and "planted" the evidence after the autopsy. It was even argued

by the Commonwealth at appellant's trial that the defense had paid Balshy to concoct his testimony about the sand and the lifters. Investigations conducted after trial by the state police and by the attorney general's office concluded that there was no evidence of perjury or falsification of evidence by Balshy. Finally, on July 12, 1988, the attorney general's office informed defense counsel that the missing lifters had been discovered, though *even then,* there seemed to be some hesitancy concerning the prosecutor's duty to disclose the evidence.

It is a gross understatement to conclude, as stated by the trial court and Superior Court that "neither the Attorney General's Office nor the Pennsylvania State Police can take any great pride in the manner in which this case was handled during the trial and on appeal." *Commonwealth v. Smith,* 404 Pa. Super. at 560 n. 3, 591 A.2d at 733 n. 3. Deliberate failure to disclose material exculpatory physical evidence during a capital trial, intentional suppression of the evidence while arguing in favor of the death sentence on direct appeal, and the investigation of Corporal Balshy's role in the production of the evidence rather than its own role in the suppression of evidence constitute prosecutorial misconduct such as violates all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause.

Prior to the decision of the United States Supreme Court in *Oregon v. Kennedy, supra,* the intentional misconduct of the prosecutor at appellant's trial would unquestionably have resulted in the invocation of the double jeopardy bar against subsequent prosecution. The standard in effect prior to *Oregon v. Kennedy* was:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions.
>
> "[The Double Jeopardy Clause] bars retrials where 'bad faith conduct by judge or prosecutor,' threatens the '[h]arassment of an accused by successive prosecutions or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." *United States v. Dinitz*, 424 U.S. [600], at 611, 47 L.Ed.2d 267, 96 S.Ct. 1075 [1081] (citations omitted).

Id., 456 U.S. at 674, 102 S.Ct. at 2088, 72 L.Ed.2d at 423-24. The same standard was embodied in our caselaw:

> The United States Supreme Court has enunciated principally two types of prosecutorial overreaching. First there is the prosecutorial misconduct which is designed to provoke a mistrial in order to secure a second, perhaps more favorable, opportunity to convict the defendant. Second there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. In contrast to prosecutorial error, overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown of the integrity of the judicial proceeding, and

> represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against.

Commonwealth v. Starks, 490 Pa. 336, 341, 416 A.2d 498, 500 (1980) (citations omitted). *Oregon v. Kennedy,* however, under the guise of simplifying and clarifying the principle, restated the test as follows:

> Because of the confusion which these varying statements of the standard in question have occasioned in other courts, we deem it best to acknowledge the confusion and its justifiability in the light of these statements from previous decisions. We do not by this opinion lay down a flat rule that where a defendant in a criminal trial successfully moves for a mistrial, he may not thereafter invoke the bar of double jeopardy against a second trial. But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

456 U.S. at 679, 102 S.Ct. at 2091, 72 L.Ed.2d at 426-27. This court, recognizing that theretofore the standard under the double jeopardy clause of the Pennsylvania Constitution had been coextensive with the federal Constitution, restated the

test in *Commonwealth v. Simons, supra,* in terms of the federal standard enunciated in *Oregon v. Kennedy.*

In neither *Oregon v. Kennedy* nor *Commonwealth v. Simons* did the reworded test produce a different result than would have been reached under the prior test. In *Oregon v. Kennedy,* the prosecutor asked a question in such form as to reflect adversely on the character of the defendant, but the inadvertent reference was not calculated to provoke a mistrial nor to prejudice the defendant; he would not have received double jeopardy protection under the prior test or under the restated test. In *Simons,* the defendant made a "doubtful" claim that the prosecutor failed to make full disclosure of a plea agreement with a Commonwealth witness, but the prosecutor's conduct clearly was not intended to provoke a mistrial nor to prejudice the defendant. The *Simons* court specifically stated that

> we are describing anew only the present applicable standard of review and the circumstances which will cause double jeopardy to attach but not changing the right itself. . . . Double jeopardy, nevertheless, continues to mean what it has always meant; no new rights were created by *Starks* nor are they being subtracted by virtue of this analysis.

Commonwealth v. Simons, 514 Pa. at 16, 522 A.2d at 541. Thus the restatement of the double jeopardy standard did not appear as a diminution of a defendant's constitutional rights, though it was predicted in *Simons* that cases might arise in which the new standard would afford less protection than the

prior test. *See Id.* at 20-23, 522 A.2d at 542-44 (Flaherty, J., concurring).

Although it is arguable that the test enunciated by the United States Supreme Court in *Oregon v. Kennedy* would bar appellant's retrial on the theory that the prosecutor's conduct was intended to subvert the protections afforded by the double jeopardy clause, *see* 456 U.S. at 675-76, 102 S.Ct. at 2088-89, 72 L.Ed.2d at 424, it is possible that some courts would not view the prosecutorial misconduct in this case as rising to the level of subversion of constitutional rights. Regardless of what may be required under the federal standard, however, our view is that the prosecutorial misconduct in this case implicates the double jeopardy clause of the Pennsylvania Constitution.

We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. Because the prosecutor's conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial.

Order reversed and appellant discharged.

LARSEN, J., did not participate in the consideration or disposition of this case.

McDERMOTT, J., did not participate in the disposition of this case.